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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HECTOR GUERRA,
Petitioner,

vs.

MARY ANN CARLO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After Sandin v. Conner ("Sandin") 515 U.S. 472, 115 S.Ct. 2293, 132 L. Ed. 2d 418 (1995), does a state criminal procedure statute create a protected liberty interest merely because it contains "mandatory language" requiring jail officials to provide a telephone call to an arrestee within three hours after arrest?

2. Did Sandin's "atypical and significant hardship" test create a *per se* rule that confinement of a pretrial detainee always implicates a protected "liberty interest," regardless of the nature of the deprivation or the conditions of the confinement of a particular detainee?

3. After Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984), is qualified immunity forfeited merely because (1) the legal methodology defining a state created liberty interest was "clearly established," and (2) the public official defendant violated the state statute?

4. In light of Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) and Vitek v. Jones, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552, (1980), may a state statute define the "process" that is due under the Due Process Clause of the Fourteenth Amendment?

5. May a federal court, consistent with the principles set forth in Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) and Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), "constitutionalize" the specific requirements set forth in state criminal procedure statutes?

LIST OF PARTIES (Rule 14.1(b))

The parties to the proceeding below were the petitioner and defendant Sheriff's Deputy Hector Guerra, defendants City of Chino, Officer T. Musslewhite, Officer D. McMullin, James E. Anthony, County of San Bernardino, Officer McCullough, Officer Burges, Sheriff's Deputy Putnam, Richard Williams, and plaintiff Mary Ann Carlo. The trial proceeded only against defendants City of Chino, the County of San Bernardino, Officer Musslewhite and petitioner Hector Guerra. The trial court dismissed the claims against defendants City of Chino and County of San Bernardino at the close of plaintiff's case. Judgment in favor of Officer Musslewhite was entered by the trial court. Because all of the remaining named defendants either were not served or were dismissed prior to trial, petitioner Hector Guerra is the only defendant who was a party to the subsequent appeal or to the present Petition for Certiorari.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 105 F.3d 493 (9th Cir. 1997), was filed on January 23, 1997, and is reprinted at Appendix A. The United States District Court of the Central District of California's unreported memorandum order and judgment filed on May 8, 1995, are reprinted at Appendices B and C respectively.

JURISDICTION

Petitioner Hector Guerra ("Guerra") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on January 23, 1997. (App. A.) On February 6, 1997, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc in the Ninth Circuit. On July 28, 1997, the Ninth Circuit denied the petition for rehearing, and rejected the suggestion for rehearing en banc. (App. D.) One active judge requested a vote on whether to rehear the matter en banc, but the matter failed to receive a majority of the votes of the nonrecused active judges. Id. The petition is filed within 90 days of the entry of such denial pursuant to 28 U.S.C. § 2101 (c) and U.S. Supreme Court Rule 13.4.

Invoking federal jurisdiction under 42 U.S.C. section 1983, respondents brought suit against petitioners in the United States District Court for the Central District of California. On May 8, 1995, the district court granted the petitioner's motion for judgment as a matter of law. (App. B.) On May 16 1995, the district court entered judgment as a matter of law in favor of petitioner. On May 24, 1995, respondent appealed the district court's order and judgment to the United States Court of Appeals for the

Ninth Circuit, pursuant to 28 U.S.C. section 1291. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS

The following statutory and constitutional provisions relevant to this petition are set forth in Appendix E:

1. Fourteenth Amendment of the United States Constitution, Section 1 at Appendix E

2. 42 U.S.C. Section 1983 at Appendix F

3. California Penal Code section 851.5 at Appendix G

STATEMENT OF THE CASE

This petition seeks certiorari review of the judgment of the United States Court of Appeals, Ninth Circuit. The basis for federal jurisdiction in the district court is 42 U.S.C. section 1983 and 28 U.S.C. section 1343(4).

Respondent was arrested for driving under the influence of alcohol and brought to a County of San Bernardino jail facility some two hours later. Petitioner Guerra failed to permit Carlo to make an immediate post-booking telephone call as required by California Penal Code section 851.5 ("section 851.5") during the five hour period Guerra was on duty. (App. G)

Plaintiff sued, claiming that in violating the statute, Guerra violated her substantive due process rights. The jury initially found for Carlo and awarded her $1.00. However, the district court found that there was no substantive due process right to an immediate post-booking telephone call; moreover, in the absence of a clearly established right, Guerra was entitled to qualified immunity.

The Ninth Circuit ostensibly resolved the appeal on a "procedural" rather than a "substantive" due process theory. The court held that under either the "mandatory language test" ("MLT") set forth in Hewitt v. Helms ("Hewitt"), 459 U.S. 460, 103 S. Ct. 864, 74 L.Ed.2d 675 (1983), or the "atypical and significant hardship" test set forth in Sandin, 115 S.Ct. 2293, section 851.5 created a liberty interest in not being held "incommunicado." (App. A9-14.) The court also determined that by violating the "process" provided by section 851.5, Guerra violated the Constitution. (Id. at A7.)

First, the decision conflicts with several decisions of this court in at least four ways:

1. The decision conflicts with this Court's decision in Sandin in several respects. The Ninth Circuit's resurrection of the "mandatory language test" conflicts with the holding and rationale of Sandin. Moreover, the court determined that section 851.5 created a liberty interest because failure to provide this post-booking telephone call constituted an "atypical and significant hardship" on pretrial detainees in the abstract. This application of the Sandin test cannot be reconciled with its application in Sandin, where this court examined the "nature of the deprivation" in light of the particular circumstances of the inmate's confinement.

2. The Ninth Circuit has adopted a qualified immunity analysis that directly conflicts with this Court's decision in Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). The Ninth Circuit essentially held that violation of a right conferred by a state statute abrogates an official's right to qualified immunity, even if the particular right in question is not clearly established under federal law.

3. The Ninth Circuit also determined that state law defines the process that is due under the Constitution, in clear contravention with the decisions of this Court.

4. In holding that violation of a state criminal procedure statute ipso facto violates the Due Process Clause, the Ninth Circuit attempts to create a new avenue to constitutionalize state law. The Ninth Circuit's attempt to constitutionalize state criminal procedure statutes ignores this Court's decisions warning lower courts not to use state law to create new rights under the Due Process Clause.

Second, as set forth herein, the Ninth Circuit's decision conflicts with decisions in other circuits in several respects. The resurrection of the MLT test has intensified an already existing conflict concerning the continued viability of this test. Some circuits hold that Sandin, not Hewitt, applies to pretrial detainees. In others, the courts acknowledge abandonment of the MLT, and use the standard set forth in Bell v. Wolfish ("Bell") 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (to protect state-created liberty interests of pretrial detainees. Carlo takes yet a third approach, finding that the MLT still applies to pretrial detainees.

The decision also conflicts with decisions in other circuits which: apply the "atypical and significant hardship" test in light of the particular conditions of an inmate's confinement; require that a "right" be clearly established under *federal*, not state law in deciding the issue of qualified immunity; define the "process due" under federal, not state law; and refuse to constitutionalize state criminal procedure statutes.

The Underlying Incident

At about 12:00 a.m. on March 9, 1991, a City of Chino police officer arrested Carlo for driving while under the influence of alcohol. During a five hour period after Carlo was brought to a County of San Bernardino jail, Hector Guerra, the watch commander on duty from 2:00 a.m. until 7:00 a.m., did not permit Carlo to leave the holding cell in order to use the telephone while he was on

duty. While the parties agree that Carlo was taken to the hospital by other officers the next morning at about 8:30 a.m., the record establishes that Carlo did not suffer any actual injuries as the result of anything Guerra allegedly did or failed to do--she was awarded only $1.00 in nominal damages.

Procedural History

Carlo sued in federal district court, alleging a federal civil rights claim under 42 U.S.C. § 1983 against Guerra and others not a party to the appeal. In relevant part, the complaint and pretrial conference order set forth the following issues to be tried: (1) whether the arresting officer or Guerra used excessive force in restraining Carlo; (2) whether Guerra was deliberately indifferent to Carlo's medical needs; (3) whether Guerra's failure to permit plaintiff to make an immediate post-booking telephone call pursuant to section 851.5 constituted a violation of her *substantive* due process rights.

On February 3, 1995, the jury found that neither the arresting officer nor Guerra used unreasonable force, and Guerra was not deliberately indifferent to Carlo's medical needs. The jury also found that Guerra violated section 851.5, and awarded Carlo $1.00 in nominal damages. The district court entered an order granting Guerra's Motion for Judgment as a Matter of Law on May 16, 1995, finding: that there was no substantive due process right to make an immediate post-booking telephone; and (2) because there was no such constitutional right, Guerra was entitled to qualified immunity. (App. B4-5.)

On appeal Carlo reasserted her substantive due process right to an immediate post-booking telephone call. Carlo also argued that the jury's determination that Guerra intentionally violated her substantive due process right under section 851.5 precluded qualified immunity as a

matter of law. Carlo did not designate any part of the reporter's transcript on appeal.

Ninth Circuit Decision

On January 23, 1997, Judges Boochever, Reinhardt, and Pregerson reversed the district court judgment. (App. A.) After briefing and oral argument, the Ninth Circuit did not resolve the only theory briefed and argued by the parties or litigated at trial, namely, Carlo's *substantive due process* claim. Instead, the Court *sua sponte* found that Guerra's violation of the state statute constituted an *ipso facto* violation of the Due Process Clause under a so-called "procedural due process" theory. (App. A13.) Specifically, the Ninth Circuit found that section 851.5 embraced a state-created liberty interest under either the "mandatory language test" set forth in Hewitt, 459 U.S. 460, 103 S. Ct. 864, or the "atypical and significant hardship" test set forth in Sandin, 115 S.Ct. 2293. (App. A9-14.) The court found that Sandin did not abandon the *Hewitt* test in the pretrial detention context.

Nonetheless, applying its own "version" of the Sandin test in the pretrial context, the Ninth Circuit observed that whether a restraint is "atypical" for purposes of defining a stated-created liberty interest does not involve a "purely empirical question, but rather one of the measure of a restraint in relation to an inmate's limited liberty rights." (App. A12.) Denying an arrestee an immediate telephone call in contravention of the California statute was "atypical" because it did not further the "central purpose" (and apparently the only relevant purpose) of detention, namely, to ensure appearance at trial. (App. A13.) Further, denying arrested persons an immediate telephone could impose a "significant hardship" by: (1) depriving arrestees of the ability to contact "an attorney almost immediately," to marshall "evidence in defense of the charge;" and (2)

denying arrestees the opportunity to immediately make arrangements to post bail and obtain an earlier release. (App. A13.) The court concluded that "by violating the California statute Guerra violated Carlo's constitutional rights." (App. A7, A13-14.)

The Ninth Circuit also articulated a new approach to qualified immunity that was neither briefed by the parties nor addressed by the court or the parties during oral argument. The Ninth Circuit did not review federal decisions to determine if there was a clearly established federal right to a post-booking telephone call. Instead, the court considered whether the legal methodology used for determining the existence of protected liberty interests was clearly established, noting that "[i]n 1991, the *Helms* test was the clearly established law." (App. A16-17.)

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S RESURRECTION OF THE *MANDATORY LANGUAGE TEST* CONFLICTS WITH THIS COURT'S DECISION IN *SANDIN V. CONNOR*.

In addressing this purported "procedural" due process theory, the Ninth Circuit's published decision resurrected the "mandatory language test" ("MLT") set forth in Hewitt. Under Hewitt, if a state law provision contained "mandatory language," it gave rise to a state-created liberty interest triggering federally-mandated procedural protections. The Ninth Circuit's resurrection of this test directly conflicts with this Court's decision in Sandin.

A. The Decision Conflicts With *Sandin's* Holding And Rationale.

The Ninth Circuit's resurrection of the MLT simply ignores Sandin's express abandonment of that test. In

Sandin, this Court reviewed a number of decisions leading up to Hewitt. Initially, under Wolff v. McDonnel, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), a state liberty interest existed if the state provision contained "mandatory language" limiting official discretion, *and* involved a liberty interest of "real substance.' (Citation)." Sandin, 115 S. Ct. at 2297.

This Court then *expressly abandoned* "*Hewitt's* methodology," which had eliminated any need to show a "grievous loss of liberty retained even after sentenced to terms of imprisonment. (Citation)." Id. at 2298, 2300 & n. 5. Specifically, this Court criticized *Hewitt's* methodology because (1) it "ceased to examine the 'nature'" of the inmate's limited liberty interest which remained after lawful confinement relative to "interests allegedly created by the State." Id. at 2298. This Court made clear that it was returning "to the due process principles [the Court] believed were correctly established and applied in *Wolff* and *Meachum*." Id. at 2300 & n. 5.

The Ninth Circuit's resurrection of the *Hewitt* test as it applies to jail inmates directly conflicts with this holding. Moreover, Carlo cannot be reconciled with the rationale set forth in Sandin. This Court identified several negative effects of applying the MLT in the context of highly volatile, violent, and unstable correctional facilities. The test encouraged prisoners to comb through prison regulations in search of mandatory language on which to base a Constitutional claim. Sandin, 115 S. Ct. at 2299. As a result, it created "disincentives for States to codify prison management procedures in the interest of uniform treatment" and "the safety of staff and inmate population." Id. Further, the test improperly involved "federal courts in the day-to-day management of prisons often squandering judicial resources," and ran counter to the Court's expressed view that "federal courts ought to afford

appropriate deference and flexibility to state officials trying to manage a volatile environment. (Citations omitted)." Id.

In Carlo, the Ninth Circuit did not even refer to, let alone analyze, whether these same policy concerns apply to an equally volatile, violent, and unstable environment such as a County jail facility. Instead, the court focused exclusively on the "single" institutional need of insuring the presence of an arrestee at trial (App. A13), thereby ignoring this Court's decision in Bell v. Wolfish, 441 U.S. 523, 539-540, 99 S. Ct. 1861, 1874 (1979). Bell rejected the argument that the government's interest in pretrial detention is limited to "ensuring a detainee's presence at trial." Id. at 540, 546, 99 S. Ct. at 1874, 1878. Quoting Wolff, supra, this Court determined that "[t]here must be a 'mutual accommodation between institutional needs and objections and the provisions of the Constitution that are of general application.' (Citation)." With respect to security needs in both settings, this Court found that "[t]here is no basis for concluding that pretrial detainees *pose any lesser security risk than convicted inmates*. Id. at 546, 99 S. Ct. at 1878 n. 28 Indeed, it may be that in certain circumstances they present a greater risk to jail security and order. (Citation)." Id. The Court concluded that the "*principle of deference*" recognized in prison cases also applies to the pretrial detention context:

> the realities of running a corrections institution are complex and difficult, and courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch. (Citations).

Id. at 547, 99 S. Ct. at 1878, n. 29. Therefore, unless there is "substantial evidence in the record" indicating that a state official has exaggerated his response to these institutional concerns, "courts ordinarily should defer to their expert judgment in such matters. (Citation)."

Id. at 547-548, 99 S. Ct. at 1878-79.

The Ninth Circuit's attempt to limit the institutional concern to one factor--the presence of the arrestee at trial--simply ignores this Court's expressed view concerning judicial deference in either "jails" or "prisons." The court simply ignored the policy concerns expressed in Sandin, which apply with equal force whether the facility houses pretrial detainees or convicted prisoners. Officials maintaining jail facilities will be subjected to civil rights lawsuits every time a detainee claims that his rights have been violated under a state criminal procedure statute which uses "mandatory language." Civil rights attorneys will "comb" through California statutes and regulations to find mandatory language to support a pretrial detainee's constitutional claim. States will be discouraged from passing statutes or regulations containing language designed to structure the discretion of jail officials and ensure the safety of both inmates and officials. Contrary to the warning in Sandin, federal courts now may oversee the daily management of jail facilities.

B. The Manner In Which The Ninth Circuit Applied The *Atypical And Significant Hardship* Test Conflicts With Its Application in *Sandin*.

The manner in which the Ninth Circuit applied the *Sandin* test also constitutes a sharp departure from its application in Sandin. Sandin itself found that whether a deprivation is "atypical and significant" depends on the particular nature of the deprivation viewed in light of *the particular* circumstances of the inmate's confinement. This Court found that the inmate's 30-day confinement in disciplinary segregation did not constitute an "atypical" or "significant deprivation or "disruption in his environment" in light of the "limited liberty interest" he retained by virtue of his "serving an indeterminate term of 30 years to

life." 115 S. Ct at 2301. The Court also found that the record showed that the 30-day confinement "did not exceed similar, but totally discretionary confinement in either *duration* or *degree of restriction* (emphasis added)." Id.

In contrast, the Ninth Circuit applied the "atypical and significant hardship" test in the abstract, focusing on how the failure to permit a telephone call immediately after being booked impinges on the abstract liberty interest of not being held "incommunicado." The court did not, as this Court did in Sandin, focus on whether the deprivation (Guerra's refusal to permit Carlo to leave the holding cell and use a telephone within the five hour period he was on duty) constituted a significant hardship on her, or whether Guerra's conduct was "atypical" in light of the manner in which other combative, intoxicated arrestees are treated in similar circumstances.[1]

---

[1] The Ninth Circuit's off-handed attempt to give the appearance of addressing the "hardship" imposed on Carlo in light of her confinement ultimately fails. The Ninth Circuit suggested that denial of a telephone call violated Carlo's right to counsel or a fair trial by preventing her from marshalling evidence to support a drunk driving defense. The court also suggested that Carlo could have obtained an earlier release if she had been able to make bail arrangements. Finally, the Ninth Circuit suggested that Carlo was deprived of an opportunity to obtain "medical" care.

There are several problems with the Ninth Circuit's purported "empirical" assessment. First, after Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), Carlo cannot assert an independent substantive due process right for any purported violation of her specific rights to counsel or to a fair trial. Moreover, Carlo did not claim violations of her rights to counsel or a fair trial.

Similarly, Carlo did not claim that the length of her detention was unreasonable under the Fourth Amendment, or that Guerra's conduct was not rationally related to a legitimate safety concern under Bell v. Wolfish.

II. CONTRARY TO *DAVIS V. SCHERER*, THE NINTH CIRCUIT NOW LOOKS TO STATE LAW IN DECIDING WHETHER A RIGHT IS CLEARLY ESTABLISHED

In denying Guerra qualified immunity based on this state-created procedural right, the Ninth Circuit did not survey the legal landscape to determine if federal courts had recognized a liberty interest based on state statutes which created a similar right to make a post-booking telephone call. Similarly, the court did not survey the legal landscape to determine whether specific federal procedures had been recognized as necessary before a person could be deprived of the liberty interest recognized by the statute. Instead, the court found that the "test" for defining a state-created liberty interest was clearly established under federal law. Under this misguided approach, since section 851.5 contained "mandatory language" and the "procedure" set forth therein was clearly defined, Guerra was not entitled to qualified immunity. (App. A17-18.)

More importantly, Carlo did not designate any portion of the trial proceedings. Therefore, no evidence existed which would have enabled the court to "apply" the *Sandin* test to the particular facts of this case. Specifically, there was no evidence before the court which would have established: that Carlo had not been given any tests to measure her blood alcohol level, or that she even requested such tests; that Carlo requested to call an attorney; that charges were filed against Carlo; that Carlo requested or even needed immediate medical attention for any "injuries" she may have sustained; or that jail personnel in similar situations permitted physically combative drunk-driving suspects to make "immediate" telephone calls regardless of safety concerns.

The only "evidence" on appeal demonstrated that Carlo did not suffer a "significant" hardship. The jury found that neither the arresting officer nor Guerra were deliberately indifferent to Carlo's medical needs, and that neither defendant caused any actual injuries.

The Ninth Circuit's decision simply cannot be reconciled with this Court's decision in Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012. In Davis, a public employee alleged that his procedural due process rights were violated when his employer discharged him without a formal predeprivation or a prompt post-deprivation hearing. The alleged "property" interest arose out of state law. Id. at 193, 104 S. Ct. at 3018 n. 11. The district court and court of appeal held that the official violated no "well-established due process rights in discharging" the state official without a hearing. Id. at 188-189, 104 S. Ct. at 3015-16. Nonetheless, they held that the state official forfeited qualified immunity by violating the procedural requirements set forth in the agency's regulations. Id.

This Court reversed, holding that no matter how "clear" a state regulation, a public official does not forfeit his qualified immunity unless "*the constitutional right he was alleged to have violated* was 'clearly established' at the time of the violation. (Citation) (original emphasis)." Id. at 194, 104 S. Ct at 3019. The majority also explicitly rejected the dissent's argument that the right "to some kind of a hearing" had been clearly established under federal law. Id. at 192, 104 S. Ct. at 3018 n. 10. This Court reasoned that "there had been no occasion to specify any minimally acceptable procedures for termination of employment." Id. Such procedures depended upon the balancing of interests set forth in Mathews v. Eldridge.

In the present case, no federal decisions had ever determined that a state statute creating a right to an immediate post-booking telephone call established a constitutionally protected "liberty interest" in not being held incommunicado. Nor had any federal decision determined that the minimum process that was due to protect this liberty interest was to permit an arrestee to make this call no later than three hours after an arrest unless "physically impossible." In the only closely analogous situation, the

Sixth Circuit held that there was no due process right to make an immediate post-booking telephone call notwithstanding the existence of a state statute conferring the right. Harrill v. Blount County, 55 F.3d 1123 (6th Cir. 1995) (it was not clearly established under federal law that failure to permit an arrestee to make an immediate telephone call as required by state law violated the Due Process Clause).

This Court also rejected an argument similar to the one made by the Ninth Circuit in Carlo, namely, that an "exception" should be made where a statute is "designed to protect constitutional rights." Id. at 195-196, 104 S.Ct. at 3020:

> Federal judges would be granted large discretion to extract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. And such judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials *to anticipate the possible legal consequences of their conduct*, but also for trial courts to decide even frivolous suits without protracted litigation.

Id. 95-96, 104 S.Ct. at 2020. The Court concluded that it would be "unfair and impracticable to require such an understanding of public officials generally." Id., fn. 13.

The Ninth Circuit attempts to "distinguish" Davis v. Scherer, supra, on the ground that in Carlo, unlike Davis, the "California statute" formed the basis of Carlo's claim, and the statute provided the "basis for the cause of action sued upon." (App. A15, quoting Davis at 194 n.12.)

However, the Ninth Circuit confuses the involvement of a state law in creating the property or liberty interest

with the federal right (procedural due process) giving rise to the cause of action. Indeed, while a state statute created the property interest in Davis, this Court held that the violation of that statute could not serve as a basis for forfeiting qualified immunity. The basis for the cause of action in Davis, as here, was the Due Process Clause of the Fourteenth Amendment.

Similarly, the California statute did not, as the Ninth Circuit argues, provide the *federal* "cause of action sued upon." A claim that a person has been deprived of an interest without due process of law is based on the procedural component of the Due Process Clause, not "state law." Whether a state statute creates a "liberty interest" triggering federal procedural protections depends on *federal* law. Sandin, 115 S. Ct. at 2298 (defining the federal standard necessary to determine whether a state statute creates a liberty interest which triggers federal procedural protections). Whether state officials have provided all the process that is due depends on *federal*, not state law. (See cases discussed, infra, at pp. 16-17.)

In summary, the Ninth Circuit's new approach to qualified immunity conflicts with Davis v. Scherer. The decision also implicates important questions of law and policy which warrant Supreme Court review. Under the Ninth Circuit's approach, the question is no longer whether a constitutional right was clearly established under federal law, but whether there was a clearly established legal methodology for determining whether a state statute creates a protected liberty interest. The question is no longer whether federal courts have recognized specific procedural protections triggered by a liberty interest, but whether a federal court will find in the future that the procedures in a state statute are required by the Due Process Clause.

This approach violates at least two clear principles previously established by this Court: (1) that to defeat qualified immunity, the contours of the Constitutional right

must be sufficiently clear that a reasonable official would understand that what he is doing violates that right (Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)); and (2) that the violation of a state statute does not abrogate an official's right to qualified immunity. Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012.

III. THE NINTH CIRCUIT'S DETERMINATION THAT A STATE STATUTE DEFINES THE PROCESS DUE UNDER THE CONSTITUTION CONFLICTS WITH DECISIONS OF THIS COURT.

This Court's decisions instruct that the "procedures" set forth in state statutes which create property or liberty interests do not establish the "process" that is due under the Constitution. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1492-1493, 84 L. Ed. 2d 494 (1985) (procedures set forth in state statute which creates a property interest in continued employment do not define the process that is due under the Due Process Clause); Vitek v. Jones, 445 U.S. 480, 491, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) (procedures required before transfer from prison to mental institution not governed by state statute creating liberty interests: "[t]hese minimal requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures"). Instead, a federal court must determine what minimum federal procedures are due based upon an analysis of the nature of the particular "private interests" involved in the case, the governmental interests, and the value of the procedural requirements. Cleveland Bd. of Education v. Loudermill, 470 U.S. at 543, 105 S. Ct. at 1493-94; Vitek v. Jones, 445 U. S. 494-496, 100 S. Ct. at 1264-1265 (district court properly set forth minimum procedures required by federal law given the "balance"

between the state's interest in segregating and treating mentally ill patients, and the inmate's interest in not being immediately deprived of "liberty interests" he currently enjoyed).

Under Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976), the Ninth Circuit was required to examine Carlo's private interests, the governmental interests, and the value of certain procedural requirements in determining whether Guerra provided all the process that was due under federal law. The court's failure to do so constitutes a sharp departure from this Court's procedural due process decisions. See also Davis v. Scherer, 468 U.S. at 192, 104 S. Ct. at 3018 n. 10 (where particular federal procedure not yet established under federal law, federal courts must balance competing interests set forth in Mathews).

IV. THE DECISION IS ERRONEOUS AND CREATES A NEW AVENUE TO CONSTITUTIONALIZE STATE LAW THROUGH THE DUE PROCESS CLAUSE.

This Court has long resisted efforts to "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Parratt v. Taylor, 451 U.S. at 544, 101 S. Ct. 1908; Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976); Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 818-819, 127 L. Ed. 2d 114 (1994) (J. Kennedy & Thomas, conc.). In light of this trend, the Ninth Circuit did not purport to create a substantive due process right to an immediate post-booking telephone call within three-hours after an arrest unless "physically impossible." Instead, the Ninth Circuit claimed that it was applying a procedural due process methodology, even though the court clearly found that a violation of the substantive standards set forth in

section 851.5 *ipso facto* constituted a violation of the Due Process Clause.

A rose by any other name is still a rose. As we explain, the Ninth Circuit has created a constitutional harbor which can now be filled with the specifically mandated requirements set forth in state criminal procedure statutes.

The decisions of this Court clearly define the difference between a "substantive due process" and "procedural due process" violation. The Due Process Clause incorporates the "substantive" constitutional rights contained in the specific provisions of the Bill of Rights, as well as other substantive rights typically "relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 114 S. Ct. at 812. A violation of these rights is complete "when the wrongful action is taken." Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990).

In procedural due process claims, the deprivation of a constitutionally protected liberty interest "is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.* (Citation)." (cite) The inquiry involves "what process the State provided, and whether it was *constitutionally* adequate." (cite). Moreover, it is well-settled by decisions of this Court and other circuits that no claim lies where the deprivation is the result of a "random and unauthorized" act of a state official and adequate state post-deprivation remedies exist. Hudson v. Palmer, 468 U.S. 517, 533 & n. 14, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); Parratt

v. Taylor, 451 U.S. at 537, 543-44, 101 S. Ct. at 1915-1917.[2]

The Ninth Circuit ignores these decisions, and incorporates in toto the state-created right set forth in section 851.5 into the Due Process Clause. Section 851.5 does not create a *substantive* "liberty interest." Rather, as the Ninth Circuit acknowledged, it embraces a *procedure* designed to protect rights guaranteed by specific provisions of the Bill of Rights, including the right to counsel, the right to a fair trial, and the right to obtain bail to secure an earlier release. (App. A13.)

Nonetheless, by determining that Guerra violated the Due Process Clause at the moment he violated section 851.5, the Ninth Circuit improperly treated this state criminal procedural right as a *substantive* right in and of itself by incorporating it wholesale into the Constitution. The court's failure to consider whether Guerra provided Carlo with adequate federal procedural protections before depriving her of these "liberty interests" demonstrates that the court did not engage in a "procedural due process analysis." Indeed, under a procedural due process methodology, the court would have had to address whether

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[2] See, Decker v. Hillsborough County Attorney's Office, 845 F.2d 17, 22 (1st Cir. 1988) (even if statute required immediate return of property seized pursuant to search warrant, plaintiff had adequate post-deprivation judicial remedies to assert his property rights); Myers v. Klevenhagen, 97 F.3d 91, 94 (5th Cir. 1996) (no procedural due process violation where Sheriff failed to provide hearing on inmate's indigency before debiting inmate's trust accounts for medical care; constitutional "minima" for random and unauthorized confiscation of property is set forth in Hudson v. Palmer, and plaintiff failed to demonstrate inadequacy of post-deprivation remedy); Stewart v. McGinnis, 5 F.3d 1031 (7th Cir. 1993) (officer's random and unauthorized destruction of noncontraband property did not constitute procedural due process violation because there were adequate post-deprivation remedies).

the state provided an adequate post-deprivation remedy for what the court itself deemed to be a random and unauthorized violation of section 851.5. (App. 7.) Yet the court failed to address this second inquiry.

In essence, the Ninth Circuit treated the right to an immediate telephone as defined in section 851.5 as part and parcel of the specific guarantees of the Bill of rights (right to counsel and to a fair trial). As in any substantive due process analysis, the Court found that the violation of Carlo's liberty interests occurred at the moment Guerra violated section 851.5.

By adopting this disguised substantive due process methodology, the Ninth Circuit ignored the distinctions made by this Court between substantive and procedural methodologies. Moreover, under this approach, all criminal procedural rights mandated by state law can be converted into "substantive" rights guaranteed by the Due Process Clause. As a result, the protections guaranteed by the Constitution will vary from state to state.

V. THE DECISION CREATES A RIPE AND DIRECT CONFLICT AMONG NUMEROUS CIRCUIT COURTS OF APPEAL.

A. The Decision Conflicts With Decisions In Other Circuits Concerning The Continued Viability Of The Mandatory Language Test.

The Ninth Circuit's resurrection of the MLT has intensified an already existing conflict in various circuit and district court decisions concerning the applicability of this test after Sandin. To date, the conflict can be broken down into three groups.

At least one circuit court and one district court have recognized this Court's rejection of the MLT and have applied the Sandin test to jails. In Watson v. City of New York, 92 F.3d 31 (2nd Cir. 1996), the court rejected a

pretrial detainee's argument that a state arraignment statute created a liberty interest to be released or arraigned within 24 hours because it contained "mandatory language." The court found that the Supreme Court rejected the "*Hewitt* methodology" because it was "'in practice . . . difficult to administer and . . . produced anomalous results' (Citation)." Id. at 37; see also, Muslim v. Frame, 897 F. Supp. 226, 234 (E.D. Penn. 1995), aff'd in unpublished decision, 107 F.3d 7 (3rd Cir. 1997) (acknowledging that MLT was abandoned in Sandin, and holding that a pretrial detainee housed in correctional facility had no liberty interest in wearing a religious headdress outside cell block area; the restriction was not "atypical" given other restrictions regulating inmate dress, and plaintiff failed to "come forward with any evidence to distinguish the headgear restrictions from other restrictions routinely imposed on inmates").

Other decisions acknowledge this Court's abandonment of the MLT, but hold, either directly or indirectly, that constitutional protection already exists under Bell v. Wolfish, 441 U.S. 523, 99 S. Ct. 1861, to protect any state-created liberty interests in the context of pretrial detention. Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996), involved challenges by a pretrial detainee to unannounced cell searches, and various procedures relating to disciplinary segregation. The Ninth Circuit found that the "atypical and significant hardship" test applies to unannounced cell searches because they involve "a security measure." Id. at 523. However, the court found that the inmate's claim of *disciplinary* segregation without due process involved a punitive-type measure and, therefore, was governed by Bell v. Wolfish, supra. Id. at 524-25, and that the process due was governed by Wolff, supra.

Similarly, Whitford v. Boglino, 63 F.3d 527 (7th Cir. 1995) did not hold that the MLT remained viable after Sandin. Whitford v. Boglino involved a *prisoner's* claim

that he was placed in administrative segregation without due process. The Seventh Circuit stated in dicta that the Sandin test might not apply to pretrial detention. Id. at 531 n. 4. However, as in Mitchell v. Dupnik, supra, the Seventh Circuit suggested that where Sandin does not apply, pretrial detainees have a federally protected right not to be punished under Bell v. Wolfish, supra. Id. See also Zarnes v. Rhodes, 64 F.3d 285, 292 (7th Cir. 1995) (stating in dicta that after Sandin, Hewitt may not apply to pretrial detentions; and, in any event, the statute relating to "disciplinary segregation" of pretrial detainees would not create a liberty interest distinct from the interest protected under Bell v. Wolfish, supra.).

Indeed, several of the unpublished and published district court decisions discussed in Carlo refer to the MLT but actually apply Bell v. Wolfish to pretrial detainee claims alleging state-created liberty interests. See, Brims v. Tracy, 1996 U.S. Dist. LEXIS (1996), cited at APP. A11 (Bell v. Wolfish rather than the Sandin test applies to disciplinary measures against a pretrial detainee]; Poole v. Jefferson County Sheriff's Dep't, 921 F. Supp. 431 (1996), cited at APP A11 (recognizing that Bell v. Wolfish governs pretrial detainees and Sandin governs prisoners, but stating that Hewitt methodology was abandoned by Supreme Court).

In contrast to all of these decisions, the Carlo court did not attempt to determine whether denial of Carlo's request to use a telephone immediately after being booked constituted a "security" as opposed to a "punitive" measure, but held that the MLT applies to claims made by pretrial detainees.[3] Only two of the *unpublished decisions*

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[3] Mitchell v. Dupnik ("Mitchell") 75 F.3d at 524 *did not* resurrect the MLT---Mitchell limited Sandin to "security" measures in jail facilities without even remotely suggesting that the MLT

cited in Carlo actually reached the same conclusion as the Carlo court. Butler v. New York State Correctional Dep't, 1996 U.S. Dist. LEXIS 11057 involved a pretrial detainee's involuntary transfer to a prison from a jail facility after his conviction was vacated. Oliver v. Hinton, 1996 U.S. Dist. LEXIS 11057 (1996) involved disciplinary measures against a pretrial detainee.[4]

Ellis v. District of Columbia, 84 F.3d 1413 (D.C. Cir. 1996) actually goes further than Carlo, holding that *even in the prison context* Sandin does not apply to decisions whether to "parole" prisoners, but is limited to "prisoners

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applies to punitive measures against jail inmates. If anything, Carlo *departed* from the "dichotomous" approach taken in Mitchell v. Dupnik, thereby providing stronger grounds to grant review and resolve the "status" of the MLT once and for all.

The Carlo court ignored the approach taken in Mitchell by failing to analyze the case under the standard set forth in Bell v. Wolfish. As discussed above, under Bell, a restriction or condition will be upheld so long as it is rationally related to *any* legitimate state interest. 441 U.S. at 538-539, 99 S.Ct. at 1874. Since this argument was never raised, briefed or argued, and because Carlo failed to designate transcripts of the trial proceedings, the court apparently felt it could not resolve the case under this theory.

[4] Like the decision in Carlo, the reasoning in these two decisions is fundamentally flawed because they ignore the holding and rationale of Sandin. Further, the district courts in both cases cited Mitchell and the dicta in Whitford as supporting the continued viability of the MLT in the context of pretrial detention. As noted, these decisions did not hold that the MLT remained viable after Sandin.

Moreover, the district court in Butler v. New York State Correctional Dep't based its decision on a non sequitur, namely, that because this Court rejected the prisoner's claim that the Bell v. Wolfish standard applies to prisoners, it follows that the MLT still applies to pretrial detainees.

challenging the conditions of their confinement or the administration of the prison." Id. at 1418.

Review should be granted to finally resolve the conflict and confusion which has intensified as a result of the Ninth Circuit's published decision.

B. The Decision Conflicts With Other Circuit Decisions Which Require A Showing That An Inmate Suffered An Atypical And Significant Hardship In Light Of The Particular Conditions Of His Confinement.

The Ninth Circuit's abstract approach also conflicts with decisions in the Ninth and other circuits, providing an additional ground for review. See, Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996) (whether reclassifying prisoner at a hearing held in his absence constitutes an "atypical and significant" hardship requires a case by case, fact by fact, consideration); Miller v. Selsky, 111 F.3d 7 (2d Cir. 1997) (district court erred in finding that Sandin created "a *per se* blanket rule that disciplinary confinement" never implicates a "liberty interest;" court must "examine the circumstances of a confinement to determine whether that confinement affected a liberty interest," a determination that necessarily depends on the specific facts of the case); Whitford v. Boglino, 63 F.3d 527 (7th Cir. 1995) (whether the length of the segregation constituted an "atypical and significant hardship" cannot be resolved in the instant case because the record is not sufficiently developed to determine "the nature of Whitford's confinement in segregation and whether it caused a "major disruption in his environment"); Kennedy v. Blankenship 100 F.3d 640, 642-43 (8th Cir. 1996) (need to look at nature of deprivation under particular circumstances to determine if it constitutes an atypical and significant restraint under Sandin).

C. The Decision Conflicts With Other Circuits' Approach To Qualified Immunity.

Review is also warranted because the Ninth Circuit's approach directly conflicts with numerous decisions in other circuits, which have held, either directly or indirectly, that qualified immunity depends on clearly established federal precedent defining the "process" due. See, Mendoza v. Blodgett, 960 F.2d 1425, 1431 (9th Cir. 1992) (the court found no preexisting law establishing notice and hearing before placing a prisoner on feces watch.)[5]; Swenson v. Trickey, 995 F.2d 132, 135 (8th Cir. 1993) (Hewitt established that a hearing must be held within a "reasonable time" before placing a prisoner in administrative segregation; however, it was not clearly established under federal law in 1986 "that release after fifteen days without a. hearing was constitutionally unreasonable."); Russell v. Selsky, 35 F.3d 55, 59 (2d Cir. 1994) (Under preexisting federal precedent due process required an "impartial" prison disciplinary hearing, but it was not clearly established that allowing a prison official to serve as both a hearing and review officer "necessarily curtails constitutionally mandated impartiality.")

D. The Ninth Circuit's Determination That A State Statute Defines The Process Due Conflicts With Decisions In Other Circuits.

The Ninth Circuit's holding that section 851.5 defines the process that was "due" under federal decisional law

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[5] Indeed, one member of the Ninth Circuit panel, Justice Reinhardt, clearly understood the import of Davis v. Scherer. In Conner v. Sakai, 15 F.3d 1463 (9th Cir. 1993), Reinhardt denied qualified immunity, finding that "the right to call witnesses at a disciplinary hearing has been clearly established since Wolff v. McDonnell was decided in 1974." Conner, 15 F.3d at 1468, rev'd sub nom., Sandin, 115 S. Ct. 2293.

also conflicts with numerous decisions in other circuits. In Mendoza v. Blodgett, 960 F.2d 1425 (9th Cir. 1992), the Ninth Circuit balanced an inmate's substantial private interests in not being subjected to "extremely unpleasant" "feces watch" procedures against the prison's substantial interest in preventing an inmate's possible involvement in drug smuggling. The court held that the post-deprivation hearing provided inadequate process in light of these competing interests.

In Watson v. City of New York ("Watson"), 92 F.3d 31 (2nd Cir. 1996) the Second Circuit rejected a pretrial detainee's argument that he had a constitutional right to be "released or arraigned within 24 hours" by virtue of a state statute containing "mandatory language." Citing to other circuit court decisions, the court found that state criminal procedural rules are designed to protect substantive interests that are *already* protected by the Constitution under the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment. Id. at 38. To create an additional "state-created" liberty interest would not only be redundant, but would require federal courts to constitutionalize "every state procedural right." Id. Further, the procedures contained in such state rules would still have to be measured by federal standards. Id.

In Myers v. Klevenhagen, 97 F.3d 91, 94 (5th Cir. 1996) the court rejected a claim that an official's failure to provide an indigency hearing prior to debiting a prison inmate's trust account as required by a prison regulation constituted a violation of the Due Process Clause.

In Kraushaar v. Flanigan, 45 F.3d 1040 (7th Cir. 1995), the Seventh Circuit held that an official's failure to comply with a state statute's conditions and restrictions on strip searches did not violate the procedural component of the Due Process Clause. The interest involved was "almost identical to the" protection provided by the reasonableness test of the Fourth Amendment. Moreover, even if the

state statute embraced a "liberty interest," plaintiff must "still go on to prove that he was denied this expectancy without due process." This was the "fundamental flaw," because the state-created "procedures" set forth in the statute cannot define the "process" that is due under the federal constitution. Id. at 1048-1049.

Similarly, in Brown v. Frey, 889 F.2d 159, 166 (8th Cir. 1989) the Eight Circuit rejected a prisoner's claim that a state statute created a "federally protected due process right to a hearing within three working days of [his] confinement:"

> The court's inquiry is not whether the [state] statute and therefore the Constitution is violated but whether the process afforded plaintiff 'satisfied the minimum requirements of the Due Process Clause.' (Citation).

Id. at 165-166; see also Kennedy v. Blankenship 100 F.3d 640, 642-43 (8th Cir. 1996) (rejecting claim that a federal constitutional liberty interest exists in having officers follow state law concerning how he should be confined); Griffin-El v. Delo, 34 F.3d 602, 604 n. 3 (8th Cir. 1994) (inmate does not have a liberty interest in a particular state-defined procedure); Hughes v. Lee County Dist. Court, 9 F.3d 1366, 1367 (8th Cir. 1993) (assertion that state violated its own procedural guidelines does not state a federal claim); Swenson v. Trickey, 995 F.2d 132, 135 (8th Cir.1993) (even if state law clearly established liberty interest in initial prison classification, statute's requirement that hearing be held within 72-hours after placement does not define the "process" due under the constitution).

E. The Ninth Circuit's Attempt To Constitutionalize State Criminal Procedure Statutes Has Been Rejected By Other Circuits.

In Harrill v. Blount County, 55 F.3d 1123 (6th Cir. 1995), the Sixth Circuit rejected the disguised "substantive

due process" analysis applied in Carlo. In Harrill, an arrestee claimed that a jail officer violated his due process right to a post-booking telephone call by violating a state statute almost identical to section 851.5. The court rejected this argument, observing that a "[a] state statute cannot create a federal constitutional right." The court reasoned that "[i]f the states could vary these federal constitutional rights by statute or local ordinance, the federal constitutional law governing arrests would vary from state to state and from city to city." Id. at 1125.

The Ninth Circuit's methodology also conflicts with Watson v. City of New York, 92 F.3d 31 (2nd Cir. 1996). In Watson, the Second Circuit rejected a detainee's argument that because a state statute used "mandatory" language, it created a "liberty interest in people being released, or at least arraigned, within 24 hours." Id. at 37-38. The court determined that a "state criminal procedure" statute does not create a "substantive" Due Process right that is violated by failing to comply with the state statute, but merely provides a procedure designed to protect the "true interest at stake in this case--freedom from confinement." Id. at 38. Plaintiff's theory would have the effect of "[c]onstitutionalizing every state procedural right." (Id. ["instead of identifying the substantive interest at stake and then ascertaining what process is due to the individual before he can be deprived of that interest, the process is viewed as a substantive end in itself"].)

The Seventh Circuit also rejected the disguised substantive due process methodology used in Carlo. In Kraushaar v. Flanigan, 45 F.3d 1040 (7th Cir. 1995), an inmate challenged a strip search on the ground that it violated an Illinois criminal procedure statute. The statute set forth the conditions and manner in which such searches could be conducted. The court held that the officer's failure to comply with the requirements of the statute did not give rise to a "substantive due process" right. Id. at

1047-1048 ["plaintiffs cannot rely upon provisions of state law to determine what conduct is reasonable under the federal Constitution; "'the violation of state law is not itself the violation of the Constitution"). The court reasoned that the inmate was "really trying to argue . . . that the state can never conduct a strip search without first obtaining written permission." Id. at 1049. Such an argument "implicates a substantive due process, rather than a procedural due process analysis." Id. ("the nub of a substantive due process claim is that some things the state just cannot do, no matter how much process it provides"); see also Doe v. Burnham, 6 F.3d 476, 480 (7th Cir. 1993) (district court erred in assessing the reasonableness of a strip search of an arrestee based on a state statute rather than the Constitution; "[t]he Illinois legislature's sense of reasonableness cannot be grafted onto the Fourth Amendment").

The Eight Circuit has similarly rejected Carlo's substantive due process methodology. Meis v. Gunter, 906 F.2d 364 (8th Cir. 1990) involved a state statute requiring prison officials to inform inmates of rules and procedures relating to, *inter alias*, "inmate rights" and "complaint procedures." Id. at 368. The court rejected an inmate's claim that the statute created a liberty interest protected by the Due Process Clause. While the statute used "mandatory language," it did "not create a certain right or entitlement subject to specified factual findings. Rather, it is a direct command that certain information be conveyed." Id. at 368-369. Therefore, there was "no question here of procedural due process" since it was "not claimed, for example, that Meis was entitled to some sort of hearing before the defendants decided not to deliver him the [material] he claims he has a right to." Id. Finally, the court noted that if this sort of state statute "created a liberty interest for federal constitutional purposes," "[w]e would be holding, in effect, that every state statute which imposes

a mandatory duty, or creates a legal right, is constitutional in nature," and a violation of the statute would constitute a "violation of the Due Process Clause of the Fourteenth Amendment." Id.

In summary, the Ninth Circuit's methodology conflicts with decisions in other circuits, which have refused to create a "due process" right to specific requirements mandated by state criminal procedure statutes. There is no realistic prospect for resolution of this conflict without a decision by this Court, since courts hereafter will either follow the Ninth Circuit or the conflicting decisions of other circuits.

CONCLUSION.

The petition should be granted.

DATED: October 21, 1997

Respectfully submitted,
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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARY ANN CARLO,
Plaintiff-Appellant,

v.

CITY OF CHINO, et al.,
Defendants,

and

OFFICER HECTOR GUERRA,
Defendant-Appellee.

No. 95-55798

D.C. No.
CV-92-168-AHS

OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
October 11, 1996—Pasadena, California

Filed January 23, 1997

Before: Harry Pregerson, Robert Boochever, and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Boochever

COUNSEL

Paula R. Norman, Klass, Helman & Ross, Los Angeles, California, for the plaintiff-appellant.

Carol D. Janssen (on the brief), David Lawrence (argued), Franscell, Strickland, Roberts & Lawrence, Pasadena, California, for the defendant-appellee.

OPINION

BOOCHEVER, Circuit Judge:

In this 42 U.S.C. § 1983 action, a district court jury found that defendant Officer Hector Guerra violated plaintiff Mary Ann Carlo's civil rights by denying her access to a telephone while she was jailed after her arrest on charges of driving while under the influence of alcohol. The district court overturned the jury verdict as a matter of law, holding that the Constitution does not recognize a right to a post-booking telephone call. Further, the court held that even if such a right does exist, it was not clearly established when Carlo was arrested; and, therefore, Guerra was entitled to qualified immunity. We reverse the district court and reinstate the jury verdict. In so doing, we hold that the state right to a post-booking telephone call creates a liberty interest protected by the Fourteenth Amendment of the United States Constitution, and that due process protections of prisoners' liberty rights were clearly established long before Carlo was arrested in 1991.

I. FACTUAL AND PROCEDURAL HISTORY

On March 9, 1991, at or about 12 a.m., plaintiff Mary Ann Carlo was arrested for driving while under the influence of alcohol and taken to a jail in San Bernardino County, California, where she was held overnight. Several times during the night Carlo asked to use a telephone. Defendant Hector Guerra, the watch commander at the jail that evening, refused to permit Carlo to place a telephone call. After a shift change in personnel and a trip to the hospital for medical attention to injuries allegedly caused by the arresting officer, Carlo finally was permitted to use a telephone at about 2:00 p.m. the following day.

Carlo filed this section 1983 action alleging that her civil rights were violated when Guerra and the other officials at the jail prevented her from making a phone call. She alleged several other civil rights violations as well, none of which is the subject of this appeal. At trial, a jury found that Guerra had deprived Carlo of a constitutional right by denying her the opportunity to make a telephone call (a right provided for by state law), and it awarded Carlo $1.00 in nominal damages. The district court then granted the defendant's motion for judgment as a matter of law, overturned the jury verdict against Guerra, and denied the plaintiff's request for attorney's fees. Carlo challenges both the judgment as a matter of law on behalf of Guerra and the denial of attorney's fees.

II. STANDARDS OF REVIEW

Judgment as a matter of law is reviewed de novo. *See Pierce v. Multnomah County*, 76 F.3d 1032, 1037 (9th Cir. 1996) (under former term "directed verdict"). In order to avoid injustice, we may consider a legal argument not presented in the district court. *Donovan v. Crisostomo*, 689 F.2d 869, 874 (9th Cir. 1982).

We also review the district court's decision on qualified immunity de novo. *Newell v. Sauser*, 79 F.3d 115, 116 (9th Cir. 1996).

III. VIOLATION OF CARLO'S CONSTITUTIONAL RIGHTS

a. State Right to Make Telephone Calls

[1] California grants arrestees the right to place three telephone calls. Section 851.5 of the California Penal Code provides in whole:

> Right of arrested person to make telephone calls; posting of sign
>
> (a) Immediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls, as described in subdivision (b).
>
> The arrested person shall be entitled to make at least three such calls at no expense if the calls are completed to telephone numbers within the local calling area.
>
> (b) At any police facility or place where an arrestee is detained, a sign containing the following information in bold block type shall be posted in a conspicuous place:
>
> That the arrestee has the right to free telephone calls within the local dialing area, or at [her] own expense if outside the local area, to three of the following:
>
> (1) An attorney of [her] choice or, if [she] has no funds, the public defender or other attorney assigned

> by the court to assist indigents, whose telephone number shall be posted. This phone call shall not be monitored, eavesdropped upon, or recorded.
>
> (2) A bail bondsman.
>
> (3) A relative or other person.
>
> (c) These telephone calls shall be given immediately upon request, or as soon as practicable.
>
> (d) This provision shall not abrogate a law enforcement officer's duty to advise a suspect of [her] right to counsel or of any other right.
>
> (e) Any public officer or employee who willfully deprives an arrested person of any right granted by this section is guilty of a misdemeanor.

Cal. Penal Code § 851.5 (1985). This section clearly establishes Carlo's right to place telephone calls under state law. The jury found that by violating the statute, Officer Guerra violated her constitutional rights. While the right to use a telephone may not per se rise to the level of a liberty interest protected by the procedural mandate of the Fourteenth Amendment, the right of an arrestee not to be held incommunicado involves a substantial liberty interest.

b. Substantive and Procedural Due Process

At trial, Carlo contended that the Due Process Clause contained a substantive due process right to a telephone call. The district court disagreed. Despite the district court's reliance on *substantive* due process analysis, we may consider a legal argument not presented in the district court to avoid injustice and where public policy so requires. This is especially true here, where despite arguing that a substantive due process right existed, Carlo in fact relied substantially on *procedural*

due process cases. *Donovan*, 689 F.2d at 873 ("Except in the case of jurisdictional questions or when particular circumstances indicate that injustice might otherwise result or where public policy requires, this Court declines to consider arguments for reversal not presented to the district court") (quotation omitted); *see also Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989) ("We liberally construe civil rights complaints.")

[2] The judge's decision to reverse as a matter of law was based on her determination that there was no violation of Carlo's substantive constitutional rights under the Fourteenth Amendment to the United States Constitution. Although the Constitution provides an arrestee with an independent right under the Fourteenth Amendment to communicate with the outside world, *see Procunier v. Martinez*, 416 U.S. 396, 418-419 (1974), *Feeley v. Sampson*, 570 F.2d 364, 373 (1st Cir. 1978), the arguments of the parties primarily concerned the question of whether the California statute created a constitutionally protected liberty interest. Therefore, we think it appropriate to consider initially the question whether the California statute gives rise to a constitutionally protected liberty interest. Moreover, in view of the conclusion we ultimately reach, we need only confirm the existence of the federal right, and need not define its precise contours here.

[3] Further, Carlo did not claim a violation of First Amendment rights. In *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986), and *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), although finding no such right was violated, we acknowledged the existence of a First Amendment right to telephone access subject to reasonable security limitations. While we are free to consider whether Guerra's conduct here rose to the level of a First Amendment violation despite Carlo's failure to raise the issue below, *see Donovan*, 869 F.2d at 873, we need not do so because our holding on procedural due process grounds gives her the relief she seeks.

c. Liberty Interest Protected by Procedural Due Process

[4] Section 1983 of title 42 of the United States Code provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U.S.C. § 1983. Thus to impose liability under that section, the plaintiff must prove a violation of a federal statute or the United States Constitution. Because she does not contend that Guerra violated a federal statute, Carlo relies on the provision of the Fourteenth Amendment to the United States Constitution that provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

[5] Moreover, Carlo does not argue that the process provided by the California statute is inadequate. She argues instead that Guerra and the other officers in the jail that night provided inadequate process by violating the statute. It is clear that once a liberty interest has been found, federal law rather than state law dictates how much process is due. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541 (1985). Without deciding in this case the minimum procedure required by the federal Constitution, however, we hold that the process provided by the California statute (requiring notice of the right to telephone calls and permitting denial of a requested immediate phone call only in the case of physical impossibility) is sufficient to satisfy constitutional due process. The question we address here is whether by violating the state statute Guerra also violated a federal constitutional right.

[6] The Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones,* 445 U.S. 480, 488 (1980). We hold that the California statute creates such a liberty interest.

[7] Traditionally, the Due Process Clause has been particularly protective of the minimal liberty interests granted to prisoners. *Cf. Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners"). In *Wolff v. McDonnell*, 418 U.S. 539 (1974), a prison inmate argued that Nebraska had granted him a liberty interest in good-time credits that by statute could not be taken away except in specific instances. The Supreme Court agreed.

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Wolff, 418 U.S. at 557 (internal citation omitted).

[8] After *Wolff*, a number of cases were handed down in which courts explained which state statutes and regulations granted protected liberty interests to prisoners. Picking up on the quoted passage from *Wolff*, courts began asking whether

the state entitlement uses mandatory language and whether the entitlement cannot be eviscerated absent meeting specific substantive preconditions. *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983). In *Helms*, a prisoner contended that Pennsylvania statutes created a liberty interest in being housed with the general prison population rather than in administrative segregation. According to the statutes, an inmate could be moved to administrative segregation if he or she engaged in serious misconduct and prison officials determined a "need for control" or "the threat of a serious disturbance." *Id.* at 472. While the Court noted that the adoption of procedural guidelines alone would not implicate the Fourteenth Amendment, it held that "the repeated use of explicitly mandatory language in connection with requiring" that specific preconditions be met before removing a prisoner from the general population "demands a conclusion that the State has created a protected liberty interest." *Id.* at 472. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989) (" 'a State creates a protected liberty interest by placing substantive limitations on official discretion' ") (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). Similarly, by placing substantive limitations on official discretion pertaining to telephone calls, California has created a protected liberty interest in an arrestee's right to communicate.

The Ninth Circuit has likewise used the mandatory language test to determine that state statutes or regulations have created a liberty interest within the meaning of the Fourteenth Amendment. In *Mendoza v. Blodgett*, this court held that a state regulation that provided that a prisoner can "be placed upon Feces Watch only upon determination that there is reasonable suspicion that [the prisoner] is currently secreting contraband" created a liberty interest within the meaning of the Fourteenth Amendment. 960 F.2d 1425, 1429 (9th Cir. 1992) (as amended) (internal citation omitted), *cert. denied*, 506 U.S. 1071 (1993). The regulation defined reasonable suspicion and detailed the permissible duration of the watch. *Id.* In finding a state-defined protected liberty interest, the court

noted that the regulation contained particularized standards and criteria, and used "explicitly mandatory" language. *Id.* *See also Allen v. Board of Pardons*, 792 F.2d 1404, 1408 (9th Cir. 1986) (finding that Montana statute created liberty interest in parole), *aff'd*, 482 U.S. 369 (1986); *McFarland v. Cassady*, 779 F.2d 1426, 1428 (9th Cir. 1986) (holding that Arizona statute created liberty interest in good-time credits).

[9] Recently in *Sandin v. Conner*, the Supreme Court again reached the question of how to determine whether a state statute grants prisoners a liberty interest recognized by the Due Process Clause. 115 S. Ct. 2293 (1995). That case, like *Helms*, involved disciplinary segregation for misconduct. The prisoner claimed that Hawaii prison regulations created a liberty interest in remaining free from disciplinary segregation, but the Court disagreed. In arriving at this conclusion, the Court applied a new test to decide when a state-created right is a Fourteenth Amendment liberty interest: "[T]hese interests will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 115 S. Ct. at 2300. It urged a "return to the due process principles we believe were correctly established and applied in *Wolff*." *Id.*

Whether *Sandin* applies in this case, however, is unclear. *Sandin* arose in the context of disciplinary segregation of a convicted prisoner, and explicitly criticized the *Helms* test for its undesirable effects on prison management. *Id.* at 2299 (noting that *Helms* creates disincentives for states to codify prison management and that it leads to micromanagement of prisons by federal courts). Therefore, the *Sandin* test appears to apply specifically to prisoners who have been convicted. *See Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) ("*Sandin* . . . recognizes that its rationale regarding incarcerated prisoners is not applicable to pretrial detainees.")[1] A

[1]In *Mitchell*, a pretrial detainee claimed several due process violations. First, he claimed that a prison regulation created a liberty interest in being

majority of the courts that have addressed this question have held that *Sandin* does not govern the assessment of state-created liberty interests for pretrial detainees. *See Whitford v. Boglino*, 63 F.3d 527, 531 n.4 (7th Cir. 1995) (holding that *Sandin* does not apply to pretrial detainees); *Brims v. Tracy*, 1996 WL 153696 at *3 (S.D.N.Y. April 3, 1996) (same); *Poole v. Jefferson County Sheriff's Dept.*, 921 F. Supp. 431, 433 (E.D. Tex. 1996) (same); *Oliver v. Hinton*, 1996 WL 99901 (N.D. Ill., Feb. 27, 1996) (same); *Butler v. New York State Correctional Dept.*, 1996 WL 438128 (S.D.N.Y., Aug. 2, 1996) (same). *Sandin* also points out that many of the regulations that courts determined had created liberty interests under *Helms* were not originally intended to confer rights on inmates. *Id.* In this case, the California statute clearly and explicitly confers a right on arrestees. Cal. Penal Code § 851.5 (a) ("an arrested person has the right to make at least three telephone calls"). *See also Ellis v. District of Columbia*,

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present during a search of his legal papers. To decide whether the regulation created a Fourteenth Amendment liberty interest this court applied the *Sandin* test. Although *Sandin* "refers to the ordinary incidents of imprisonment under a sentence after conviction," a cell search is a "general security measure of the kind that the Supreme Court has said pretrial detainees may be subjected." Thus we concluded that for the purposes of a cell search, the plaintiff was more like a convicted prisoner than a pretrial detainee. *Id.* at 523. The plaintiff also contended that his liberty interest in being free from disciplinary segregation was denied without due process of law. While *Sandin* held that "an incarcerated prisoner had no liberty interest in being free from segregated confinement imposed as a disciplinary measure," "its rationale regarding incarcerated prisoners is not applicable to pretrial detainees. *Sandin* leaves *Bell v. Wolfish* untouched." *Id.* at 523-24. Under *Bell v. Wolfish*, 441 U.S. 520 (1979), a pretrial detainee does have an interest, grounded directly in the federal Constitution, in not being punished without a due process hearing. *Id.* at 524.

Thus, *Mitchell* holds that pretrial detainees' liberty interests arising directly out of the Constitution are governed by *Bell v. Wolfish*. It further holds that in some pretrial detainee cases *Sandin* will apply to determine whether a state law creates a liberty interest protected by the Fourteenth Amendment. *Mitchell* leaves unanswered the question, however, of what test to apply in the remainder of the pretrial-detainee, state-created right cases.

84 F.3d 1413, 1418 (D.C. Cir. 1996) (*Sandin* "relates to claims dealing with the day-to-day management of prisons").

While *Sandin* abandoned the reasoning in *Helms*, at least as to convicted prisoners, it explicitly did not overrule *Helms*. *Sandin*, 115 S. Ct. at 2300 n.5. According to the rule in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), where a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls," leaving to the Supreme Court "the prerogative of overruling its own decisions." *Id.* at 484. Under that rule *Helms* may continue to apply outside the context of convicted prisoners.

We believe that under either standard the California statute creates a protected liberty interest. Under *Helms*, the statute substantively limits an officer's discretion because it makes a telephone call mandatory unless physically impossible. Cal. Penal Code § 851.5 (a).

[10] The *Sandin* test also results in finding a protected liberty interest. In the context of an arrestee, the *Sandin* standard can be restated as recognizing liberty interests in state laws where they grant "freedom from restraint which . . . imposes atypical and significant hardship on the [arrestee] in relation to the ordinary incidents of [being held following an arrest]." 115 S. Ct. at 2300. The holding of an arrestee incommunicado without just cause is atypical of post-arrest detention and is a restraint that imposes "significant hardship."

Whether a restraint is "atypical" under *Sandin* is not a purely empirical question, but rather one of the measure of a restraint in relation to an inmate's limited liberty rights. Under *Bell v. Wolfish*, a pretrial detainee may not be "punished." 441 U.S. at 536-37. There is an important distinction between the status of an arrestee and a pretrial detainee. An arrestee has not yet undergone the judicial determination of probable

cause that has been applied to the pretrial detainee. An arrestee, thus, "is entitled *at least* to the protections afforded pretrial detainees." *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1485 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 549 (1993). The central purpose of detention at this stage is to ensure that a defendant will appear at trial. *Id.* Prohibiting an arrestee from making a telephone call in no way furthers this purpose. Accordingly, we conclude that holding an arrestee incommunicado is a restraint atypical of post-arrest detention.

[11] In addition to imposing an atypical restraint, the inability to use a telephone shortly after being booked amounts to a "significant hardship." First, a telephone call allows an arrestee to contact an attorney almost immediately. This often will be of paramount importance in marshalling evidence in defense of the charged offense. In this case, Carlo was arrested for driving while under the influence of alcohol. Evidence (in the form of her blood alcohol content) of whether or not she had committed the crime of which she was accused dissipated as the hours wore on, and "[b]y denying [her] access to a telephone . . . after her arrest for DUI, the State denied her the means by which she could establish her defense." *State v. Carr*, 911 P.2d 774, 777 (Ct. App. Idaho 1995). Further, a telephone call would have permitted Carlo to contact a family member or some other person who may have enabled her to post bail. Again, this was particularly significant in Carlo's case because she had suffered injuries and wished to seek medical attention that the jail did not provide for her until later the next day.

[12] While these examples are not an exhaustive recital of the important benefits of a post-booking telephone call and the hardship created by its denial, they demonstrate that the right granted by the California statute is one of "real substance" and merits constitutional due process protections. *Wolff*, 418 U.S. at 557 (state-created right of "real substance" entitled to due process protections). We hold that by violating

the California statute Guerra violated Carlo's constitutional rights.

IV. GUERRA'S QUALIFIED IMMUNITY

Guerra argues that even if he violated Carlo's civil rights, his qualified immunity prevents liability for that violation. After de novo review of the doctrine of qualified immunity as it applies to this case, we disagree.

[13] In order to hurdle a defendant's claim of qualified immunity, a plaintiff must satisfy a two-part test. First, the alleged violation must be of a right that is clearly established. *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1319 (9th Cir. 1995). " 'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Second, the defendant must show that "a reasonable . . . officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right." *Gasho v. United States*, 39 F.3d 1420, 1438 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2582 (1995).

[14] Qualified immunity creates a "balance . . . between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties" by making it possible "for officials reasonably [to] anticipate when their conduct may give rise to liability for damages. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 639-40 (internal quotations omitted). This balancing test permits officials to exercise the discretion asked of them without the fear of liability to circumscribe their decision-making.

That discretion is bounded, however, and thus officials are expected to act in accordance with "clearly established" law. In this case, Guerra cannot argue that he did not know that denying Carlo a telephone call was illegal. A California statute clearly provided that he should have permitted her up to three phone calls immediately upon being booked or at least within three hours thereof. Cal. Penal Code § 851.5 (a), (c).

It is not enough to say simply that the right was clearly established by the California statute. The statute is relevant, however, in determining whether Carlo's constitutional right was clearly established.

Davis v. Scherer, 468 U.S. 183 (1984), held that officials sued for violations of constitutional rights "do not forfeit their immunity by violating some *other* statute or regulation." *Id.* at 194 n.12 (emphasis in original). *See Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994) (describing *Davis* as holding that "the clearly established right [must] be the federal right on which the claim for relief is based").

[15] *Davis* was careful to point out, however, that in that case there was "no claim that the . . . violation of the state regulation either [was] itself actionable under § 1983 or bears upon the claim of constitutional right that appellee asserts under § 1983." *Id.* at 193. It goes on to state that "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation — of federal or of state law — *unless that statute or regulation provides the basis for the cause of action sued upon.*" *Id.* at 194 n.12 (emphasis added). "State law may bear upon a claim under the Due Process Clause when the . . . interests protected by the Fourteenth Amendment are created by state law." *Id.* at 193 n.11. Here, the California statute was the basis for Carlo's claim and thus bears on whether the federal right (procedural protection of the state-defined constitutional liberty right) was clearly established.

[16] The existence of due process protection for state-created liberty interests for prisoners has been clearly established at least since 1974. That year *Wolff* held that where a state-created right has "real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' " it is entitled "to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." 418 U.S. at 557. Cases following *Wolff* defined which state rights are protected liberty interests and which are not. *See, e.g., supra Hewitt v. Helms*, 459 U.S. 460 (1983); *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454 (1989). The clearly established test at the time of Carlo's arrest in 1991 asked whether the provision granting a right was framed in mandatory or discretionary language and whether it placed substantive limitations on an officer's discretion.[2] *Helms*, 459 U.S. at 463; *Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir. 1995). State statutes that did circumscribe discretion with substantive limits and mandatory language created protected liberty interests. *Kentucky Dep't of Corrections*, 490 U.S. at 462. *See McFarland*, 779 F.2d at 1428 (applying *Helms* test to find state statute created liberty interest in receipt of good-time credits); *Sourbeer v. Robinson*, 791 F.2d 1094, 1100-01 (3rd Cir. 1986) (applying *Helms* test to find state statute created liberty interest in remaining housed with the general prison population), *cert. denied*, 483 U.S. 1032 (1987); *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 827 (1st Cir. 1987) (applying *Helms* standard to find Puerto Rico rule governing emergency segregation and transfer among prisons creates a liberty interest); *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 798-99 (11th Cir. 1987) (applying

[2]Although *Sandin* has articulated a new test, at least for convicted prisoners, for determining when a state statute creates an interest protected by the Fourteenth Amendment, *Sandin* did not address the question of qualified immunity. Qualified immunity asks what law was clearly established at the time the alleged violation occurred. In 1991, the *Helms* test was the clearly established law.

Helms-like test to find a state-created liberty interest in social worker supervision of children in foster homes), *cert. denied*, 489 U.S. 1065 (1989); *Long v. Norris*, 929 F.2d 1111, 1116-17 (6th Cir. 1991) (applying *Helms* test to find state-created liberty interest in prison visitation rights), *cert. denied*, 502 U.S. 863 (1991).

[17] The California statute at issue drastically limits an officer's discretion. It requires that an arrestee be permitted to make three telephone calls. Its mandatory language entitles an arrestee to phone calls "immediately upon being booked" or "no later than three hours after arrest," providing exceptions only for physical impossibility. Cal. Penal Code § 851.5 (a), (c). Moreover, it holds criminally liable an officer who "willfully deprives an arrested person" of this right. Cal. Penal Code § 851.5 (e). As required by the test applied in 1991, the statute uses mandatory language to bind an officer's discretion regarding whether to permit an arrestee to use a telephone. Under *Helms*, it was clearly established that the California statute created a liberty interest.

Two other circuits have addressed this qualified immunity question. The Sixth Circuit in 1985 interpreted *Davis v. Scherer* in a case involving a prisoner's state-created right to possess books not threatening to the security of the prison. The court held that a violation of a state statute "is sufficient to cause officials to forfeit their qualified immunity" when the statute "provides the basis for the cause of action sued upon." *Spruytte v. Walters*, 753 F.2d 498, 510-11 (6th Cir. 1985) (internal citation omitted), *cert. denied*, 474 U.S. 1054 (1986). More recently in the Seventh Circuit, an inmate charged that prison officials violated the Fourteenth Amendment by depriving him of a state-created liberty interest without due process of law. The prisoner claimed the deprivation of a right to a haircut. The appellate court remanded to determine whether the prison regulation created a protected liberty interest under *Sandin*, but held there was no right to qualified immunity because it was established that state laws creating

a liberty interest are protected by the federal Constitution. We agree with the Seventh Circuit's holding that "[t]here is no novelty to this claim . . . and therefore no basis for a defense of immunity." *Anderson v. Romero*, 72 F.3d 518, 527 (7th Cir. 1995).

[18] Given the clarity of the statute and the law defining liberty interests at the time, no reasonable officer could have believed that denying Carlo telephone calls did not violate her constitutional rights.

V. ATTORNEY'S FEES

[19] Carlo is the prevailing party and as such is entitled to attorney's fees under 42 U.S.C. § 1988. *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) (a plaintiff who obtains even a nominal damage award is a prevailing party under section 1988). On remand, the district court should consider the principles set forth by this court in *Morales v. City of San Rafael*, 96 F.3d 359, 364-65 (9th Cir. 1996) to determine the appropriate sum of attorney's fees, including fees incurred on appeal.

VI. CONCLUSION

The right to a telephone call, as detailed in California Penal Code § 851.5, constitutes a liberty interest recognized by the due process clause of the Fourteenth Amendment. The constitutional protections of such a liberty interest were clearly established at the time Guerra denied Carlo the right to place telephone calls. Therefore we reverse the district court's judgment as a matter of law and reinstate the jury verdict. We further remand to the district court to determine appropriate attorney's fees, including fees incurred upon appeal.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
May 8, 1995
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
May 16, 1995
Clerk, U.S. District Court
Central District of California
By Deputy

MARY ANN CARLO,
Plaintiff,
v.
CITY OF CHINO, ET AL.,
Defendants

SACV92-168AHS (RWR)

ORDER

The motion of defendant Hector Guerra for judgment as a matter of law and the motion of plaintiff Mary Ann Carlo for an award of attorney's fees came on regularly for hearing before the Honorable Alicemarie H. Stotler, United States District Court Judge, presiding, on April 24, 1995. W. Charles Bradley appeared on behalf of defendant Hector Guerra and Paula Norman appeared on behalf of Mary Ann Carlo.

After considering all papers submitted in support of and opposition to the motions, as well as the arguments of counsel,

IT IS HEREBY ORDERED that:

Defendant Hector Guerra's motion for judgment as a matter of law is granted.

Plaintiff Mary Ann Carlo's motion for attorney's fees is denied.

Dated: May 8, 1995

/s/ Alicemarie H. Stotler
ALICEMARIE H. STOTLER
nited States District Court Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SACV 92-168-AHS Date: April 24, 1995

Title: MARY ANN CARLO v. CITY OF CHINO, ET AL.,

PRESENT:
HONORABLE ALICEMARIE H. STOTLER, JUDGE

PAUL D. PIERSON
Courtroom Clerk

KATHY HAALAND
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Paula Norman

ATTORNEYS PRESENT FOR DEFENDANTS:
W. Charles Bradley

PROCEEDINGS:

Plaintiff's Motion for Award of Attorney Fees

Defendant's Motion for Judgment As a Matter of Law

Cause called. Counsel make their appearances. Court questions counsel and hears statements. Defendant's Motion for Judgment as a Matter of Law is granted. Plaintiff's Motion for Award of Attorney Fees is denied. The Court instructs defendant's counsel to prepare, serve and lodge a proposed judgment and proposed order denying plaintiff's motion for award of attorney fees forthwith. Court adopts tentative ruling attached hereto.

Initials of Deputy Clerk PDP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE ALICEMARIE H. STOTLER, JUDGE, PRESIDING

TENTATIVE RULING* ON
LAW & MOTION MATTERS

April 24, 1995, Calendar No. 1

CASE: CARLO V. City of Chino, et al.
SA CV 92-168-AHS

MOTION(S) PENDING:
(1) Defendant Guerra's Motion for Judgment as a Matter of Law;
(2) Plaintiff's Motion for Award of Attorney's Fees

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1. The Court grants defendant Guerra's Motion for Judgment as a Matter of Fact.

a. **No Substantive Constitutional Right:**

There is no independent constitutional right to a phone call during the booking process. See, e.g., State

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* If all counsel submit for ruling on this Tentative Ruling and notify the Courtroom Deputy Clerk immediately, this Tentative Ruling will become the Court's minute order. After all appearances and submissions have been noted by the Clerk, the matter will not be called and there will be no need to remain. The prevailing party shall prepare, serve, and lodge a Proposed Order consistent with this Court's ruling. See Local Rule 14.1.

Bank of St. Charles v. CAMIC, 712 F.2d 1140, 1145 (7th Cir. 1983). Therefore, plaintiff's claim for a right to a phone call must rest on the argument that Cal. Penal Code § 851.5 gives rise to a constitutional right which defendant violated.

The cases plaintiff cites for the proposition that § 851.5 creates a constitutional right are all procedural due process cases. See, e.g., Haygood v. Younger, 769 F.2d 1350, 1355 (9th Cir. 1985). Plaintiff in this case claimed Officer Guerra violated her substantive due process right to a phone call. Specifically, in the Pretrial Conference Order ("PTO"), the issue of law to be decided reads as follows: "Whether the failure to provide plaintiff a telephone call (if proved) is a substantive due process violation such that there is liability under Section 1983." See PTO ¶ 8(d).

Courts have rejected the theory that a state statute can create substantive constitutional rights which are not contained in the Constitution itself. See Moore v. The Marketplace Restaurant, Inc., 754 F.2d 1336, 1349 (7th Cir. 1985) ("an alleged violation of a state statute does not give rise to a corresponding § 1983 violation, unless the right encompassed in the state statute in guaranteed under the United States Constitution"). Because the right to a phone call is not guaranteed by the Constitution, plaintiff has failed to show that she had this substantive due process right. Since she had no substantive due process right to a phone call, Guerra could not have violated this right. Thus, no evidence could support the Jury's finding for plaintiff on this issue, and the Court grants Officer Guerra Judgment as a Matter of Law. See Fed. R. Civ. P. 50(a), 50(b).

b. **Qualified Immunity**

Alternatively, the Court grants the motion on the ground that Guerra is entitled to a qualified immunity from this claim. To overcome a qualified immunity claim, plaintiff must demonstrate that a clearly established constitutional right existed. See Act Up!/Portland v. Bagley, 988 F.2d 863, 871-873 (9th Cir. 1993); Davis v. Scherer, 468 U.S. 183, 194 (1984).

Even if the Court found a constitutional right to a phone call did exist, this constitutional right was not clearly established at the time of the alleged violation. While § 851.5 provides clear mandates, violation of a statute alone will not deprive a defendant or qualified immunity. See id. at 193-94; Bothke v. Fluor Engineers & Constructors, Inc., 834 F.2d 804, 808 (9th Cir. 1987) (in Bivens action, correct focus is on constitutional rights, not statutory rights). Accordingly, defendant is entitled to qualified immunity on this claim. See Acts Up!, 988 F.2d at 871.

2. The Court denies plaintiff's Motion for Award of Attorney's Fees.

Given the above conclusion, the Court denies plaintiff's motion for attorney's fees because plaintiff is no longer the prevailing party. See 42 U.S.C. § 1988.

Even if defendant's motion were not granted, plaintiff's motion would not be well taken because plaintiff's verdict of only one dollar on only one of her claims does not entitle her to fees under § 1988. See Romberg v. Nichols, 48 F.3d 453 (9th Cir. 1995).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
May 8, 1995
Clerk, U.S. District Court
Central District of California
By Deputy
ENTERED
May 16, 1995
Clerk, U.S. District Court
Central District of California
By Deputy

Defendant Hector Guerra's motion for judgment as a matter of law came on for hearing on April 24, 1995, before the Honorable Alicemarie H. Stotler, United States District Court Judge, presiding. The issues raised by defendant's motion having been duly heard and upon consideration of the authorities submitted in support of, and in opposition to, defendant's motion,

IT IS HEREBY ORDERED AND ADJUDGED that:

Plaintiff take nothing and that judgment be entered in favor of defendant, Hector Guerra, and that defendant recover his costs of the action.

Dated: May 8, 1995

/s/Alicemarie H. Stotler
ALICEMARIE H. STOTLER
United States District Court Judge

Prepared by:
W. Charles Bradley
FRANSCELL, STRICKLAND ROBERTS
& LAWRENCE
Attorneys for Defendant,
HECTOR GUERRA

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
July 28, 1997
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

MARY ANN CARLO,
Plaintiff-Appellant,
v.
CITY OF CHINO, et al.,
Defendants,
and
OFFICER HECTOR GUERRA,
Defendant-Appellee

NO. 95-55798
DC NO. SACV92-0168-AHS
ORDER

Before: PREGERSON, BOOCHEVER, and REINHARDT, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Pregerson and Reinhardt voted to reject the suggestion for rehearing en banc and Judge Boochever so recommended.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc considerations. Fed. R. App. R. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

Fourteenth Amendment of the United States Constitution, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX F

The Civil Rights Act of 1871, 42 U.S.C. § 1983, *as amended by* Act of Oct. 19, 1996, 110 Stat. 3853.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall be be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

APPENDIX G

California Penal Code section 851.5 (West 1985)

"§ 851.5 **Right of arrested person to make telephone calls; posting of sign**

(a) Immediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls, as described in subdivision (b).

The arrested person shall be entitled to make at least three such calls at no expense if the calls are completed to telephone numbers within the local calling area.

(b) At any police facility or place where an arrestee is detained, a sign containing the following in bold block type shall be posted in a conspicuous place:

That the arrestee has the right to free telephone calls within the local dialing area, or at his own expense if outside the local area, to three of the following:

(1) An attorney of his choice or, if he has no funds, the public defender or other attorney assigned by the court to assist indigents, whose telephone number shall be posted. This phone call shall not be monitored, eavesdropped upon, or recorded.

(2) A bail bondsman.

(3) A relative or other person.

(c) These telephone calls shall be given immediately upon request, or as soon as practicable.

(d) This provision shall not abrogate a law enforcement officer's duty to advise a suspect of his right to counsel or of any other right.

(e) Any public officer or employee who willfully deprives an arrested person of any right granted by this section is guilty of a misdemeanor."

MOTION FILED

NOV 2 1997

(2)

No. 97-715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HECTOR GUERRA,

Petitioner,

vs.

MARY ANN CARLO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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1998

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Can state criminal procedure statutes create "liberty interests" protected by the Fourteenth Amendment?

2. After *Sandin* v. *Conner*, 515 U. S. 472 (1995) is the use of "mandatory language" in a state statute still relevant to the definition of a "liberty interest" outside the prison context?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HECTOR GUERRA,

Petitioner,

vs.

MARY ANN CARLO,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's creation of a federally protected liberty interest in post-booking phone calls creates one more source of

expensive litigation against law enforcement agencies, diminishing the resources available for protection of the public. This addition to the numerous rights the arrestee already holds is contrary to the rights of victims and society which CJLF was formed to advance.

November, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HECTOR GUERRA,

Petitioner,

vs.

MARY ANN CARLO,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Around midnight on March 9, 1991, Mary Ann Carlo was arrested for driving under the influence in San Bernardino County.[1] *Carlo* v. *City of Chino*, 105 F. 3d 493, 495 (CA9 1997). She was held overnight, and several times during the night she asked to use a telephone. *Ibid.* Hector Guerra, the watch commander on duty that night, denied these requests. *Ibid.* She was allowed to make a phone call at 2:00 p.m., 14 hours after her arrest. *Ibid.*

Carlo filed an action under 42 U. S. C. § 1983 claiming that her civil rights were violated when Officer Guerra denied her the opportunity to make a phone call, as required by California Penal Code § 851.5. *Ibid.* Section 851.5 requires that

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

"[i]mmediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least three completed telephone calls." Cal. Penal Code § 851.5(a). Carlo claimed that this deprivation of her state right violated the Due Process Clause. 105 F. 3d, at 495. In the District Court, a jury found Carlo had been denied a constitutional right and awarded her nominal damages. *Ibid.* On defendant's motion for judgment as a matter of law, the district judge overturned the jury's verdict, concluding that Carlo did not have a substantive due process right to make a telephone call. *Id.*, at 495-496.

The Court of Appeals, reviewing de novo, abandoned the substantive due process approach and proceeded under a procedural due process analysis. *Ibid.* Unable to ascertain the applicability of *Sandin* v. *Conner*, 515 U. S. 472 (1995) in the pretrial detainee context,[2] the Court of Appeals opted to evaluate whether Carlo had a protected liberty interest both by applying the *Sandin* "atypical, significant hardship" analysis and by looking for mandatory language within the Penal Code as required by *Hewitt* v. *Helms*, 459 U. S. 460, 471-72 (1983).[3]

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2. The court noted that in *Mitchell* v. *Dupnik*, 75 F. 3d 517, 523 (CA9 1996) the Ninth Circuit concluded that *Sandin*'s " 'rationale regarding incarcerated prisoners is not applicable to pretrial detainees,' " *Carlo*, 105 F. 3d, at 499, n. 1, leaving "unanswered the question . . . of what test to apply in the remainder of the pretrial-detainee, state created right cases." *Ibid.* The court also recognized other circuit court cases concluding or implying that *Sandin* does not apply to pretrial detainees. *Id.*, at 499. As the petition for certiorari points out, these cases are in conflict with *Watson* v. *City of New York*, 92 F. 3d 31, 37 (CA2 1996) and *Muslim* v. *Frame*, 897 F. Supp. 215, 234 (ED Penn. 1995), each recognizing in the pretrial detainee setting that the *Hewitt* methodology was abandoned in *Sandin*. See Pet. for Cert. 20-21.

3. To avoid ruling on *Sandin*'s applicability, lower courts will often apply both *Sandin*'s "atypical, significant hardship" analysis and *Hewitt*'s mandatory language test, leaving the question unresolved. For example, in *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178 (CA6 1997), cert. granted, 138 L. Ed. 2d 1011, 117 S. Ct. 2507 (1997), the court questioned "whether the [*Sandin*] Court intended to eliminate the mandatory/discretionary distinction altogether, looking to the alternate means of protecting 'atypical and significant'

Carlo, 105 F. 3d, at 499-500. The Court of Appeals concluded that "under either standard the California statute creates a protected liberty interest." *Id.*, at 499. In conclusion, the Court of Appeals held "that by violating the California statute Guerra violated Carlo's constitutional rights." *Id.*, at 500.

SUMMARY OF ARGUMENT

In the present case, the Ninth Circuit was asked to address the question of whether a state statute, conferring a right to a post-booking phone call, could create a liberty interest protected by the Fourteenth Amendment. The court's answer to this question conflicts with other circuit court opinions and illuminates the confusion surrounding this Court's holding in *Sandin* v. *Conner*, 515 U. S. 472 (1995).

Resolution of the conflicts between the circuits requires this Court to address an important federal question: Can state criminal procedure statutes create liberty interests protected by the Fourteenth Amendment? This question goes to the heart of the due process analysis, and, as the *Harrill*, *Watson*, and *Carlo* opinions illustrate, the lower courts need direction in answering this question.

---

hardships under state law [citation omitted], or whether the Court simply intended to set up a further requirement for forming state-law liberty interests, making mandatory language in state procedures a necessary but no longer sufficient condition in finding such interests." *Id.*, at 1185. The Sixth Circuit avoided the resolution of this issue, concluding that under either of the interpretations Woodard would not prevail on his claim. *Id.*, at 1186.

Courts have also found "it more prudent not to rule on the *Sandin* issue directly" and have chosen to resolve matters presented on other grounds. *Campo* v. *Keane*, 913 F. Supp. 814, 821 (SDNY 1996); see also *Bedoya* v. *Coughlin*, 91 F. 3d 349, 352 (CA2 1996); *Rodriguez* v. *Phillips*, 66 F. 3d 470, 480 (CA2 1995); *Moore* v. *Selsky*, 900 F. Supp. 670, 673 (SDNY 1995). This indecision reflects an uncertainty in the law which only this Court can resolve. See part III, *infra*, at 9-11.

Further, the confusion as to the scope and effect that should be given to the *Sandin* opinion is apparent among the lower courts. The extent to which *Sandin* abandoned the mandatory language test needs to be explained. The anomalous effect the *Sandin* opinion has in the parole context needs to be rectified by the Court. Only this Court can resolve the conflict between *Sandin*'s abandonment of the *Hewitt* v. *Helms* methodology and earlier, not yet overruled Supreme Court precedents employing that methodology. The Court should grant the writ of certiorari to resolve these issues.

ARGUMENT

I. The Ninth Circuit's opinion conflicts with other courts of appeals on the creation of "liberty interests" by state criminal procedure statutes.

A. Harrill v. Blount County.

The Ninth Circuit decided this important federal question in a manner that conflicts with the approach taken by the Sixth Circuit in *Harrill* v. *Blount County*, 55 F. 3d 1123 (1995). The *Harrill* opinion is almost identical factually to the present case. Debra Harrill was arrested "for concealing stolen property by driving a stolen vehicle." *Id.*, at 1124-1125. She was prevented from making an immediate phone call to her father. *Id.*, at 1125. Like California, Tennessee has a statute that confers a right to a telephone call to arrestees after booking. *Ibid.* The statute states in relevant part:

> "No Person under arrest . . . shall have his name entered on any . . . record until such time that the person has successfully completed a telephone call to an attorney, relative, minister or any other person that he shall choose, without undue delay. One (1) hour shall constitute a reasonable time without undue delay. However, if the arrested person does not choose to make a telephone call, then he shall be 'booked' or docketed immediately." Tenn. Code Ann. § 40-7-106(b).

Plaintiff Harrill argued, to advance her § 1983 claim, that the statute created a right protected by the Due Process Clause. *Harrill*, 55 F. 3d, at 1125. The Sixth Circuit did not agree. *Ibid.* The court explained that the "right to make a phone call immediately upon arrest is not a recognized property right, nor is it a traditional liberty interest recognized by federal law" and concluded that a "violation of a right created and recognized only under state law is not actionable under § 1983." *Ibid.* This conflicts with the Ninth Circuit's reliance on a similar state law to create a federally protected right for arrestees.

B. Watson v. City of New York.

The Court of Appeals' recognition of a liberty interest stemming from Penal Code § 851.5 also conflicts with the approach taken by *Watson* v. *City of New York*, 92 F. 3d 31 (CA2 1996). In *Watson*, the plaintiff claimed that her due process rights were violated when the state failed to arraign her within 24 hours of her arrest. *Id.*, at 34. Watson was arraigned approximately 36 hours after her arrest. *Ibid.* This was well within the federal 48-hour limit set by *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 56 (1991). The plaintiff relied on § 140.20(1) of the New York Criminal Procedure Law to advance her claim. *Watson*, 92 F. 3d, at 35. This section, as interpreted in *People ex rel. Maxian ex rel. Roundtree* v. *Brown*, 77 N. Y. 422, 570 N. E. 2d 223 (1991) (*per curiam*), finds a "delay in arraignment of more than twenty-four hours . . . presumptively 'unnecessary . . . .' " *Watson*, 92 F. 3d, at 35. Accordingly, Watson argued that by enacting the statute, " 'New York created a federally protected liberty interest in being released, or at least arraigned, within 24 hours.' " *Id.*, at 37. The court found the plaintiff's reliance on a state criminal procedure rule "fundamentally flawed . . . ." *Ibid.* The court recognized that there is "[a]mple precedent" that establishes that rules of criminal procedure cannot create liberty interests. *Id.*, at 37-38. The court cited *Olim* v. *Wakinekona*, 461 U. S. 238, 250 (1983) for the proposition that " '[p]rocess in not an end in itself' " and its "constitutional purpose is to protect a substan-

tive interest to which the individual has a legitimate claim of entitlement." *Watson*, 92 F.3d, at 38.

Watson recognizes that the "liberty interest" in most pretrial detention cases is "liberty" in its core sense of freedom from the physical restraint of incarceration. The imprisonment of people who have not yet been convicted of any crime is a sensitive area, involving both important considerations of public safety, see, *e.g.*, *United States* v. *Salerno*, 481 U. S. 739, 755 (1987), and great potential for injustice. For this reason, pretrial arrest and detention is surrounded by a host of protections, state and federal, constitutional and statutory. Foremost of these is the Fourth Amendment, with its requirements for probable cause for arrest, *Gerstein* v. *Pugh*, 420 U. S. 103, 111 (1975), warrants in some cases, see *Payton* v. *New York*, 445 U. S. 573, 603 (1980), and a hearing before a neutral magistrate within 48 hours. *County of Riverside* v. *McLaughlin*, *supra*, 500 U. S., at 56. The common law writ of habeas corpus, guaranteed in the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2, and cognate state provisions, see, *e.g.*, Cal. Const., Art. I, § 11, was primarily a pretrial remedy. See *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 839, 116 S. Ct. 2333, 2340 (1996). It remains available for that purpose to this day, when other remedies fail. See *Watson*, *supra*, 92 F. 3d, at 34, n. 2 (citing *People ex rel. Maxian ex rel. Roundtree* v. *Brown*, 77 N. Y. 422, 426-427, 570 N. E. 2d 223, 224-225 (1991) (*per curiam*)). State statutes, such as those at issue in this case, *Watson*, and *Harrill* provide further protections.

These protections, *Watson* noted, are not ends in themselves but devices for setting free people who have been wrongly jailed. The purpose of the statutory right to a phone call is to contact a lawyer, or someone who can arrange for a lawyer, who can then set in motion the procedures to obtain the arrestee's release, whether unconditionally, on own recognizance, or on bail. The phone call is not a "liberty interest" in itself. Similarly, the *Watson* court concluded, "Arraignment, however, is a *procedure* that protects the true liberty interest at stake in this

case—freedom from confinement." 92 F. 3d, at 38 (emphasis in original).

Watson and the Court of Appeals' opinion in the present case are thus in square conflict over the question of whether state criminal procedure statutes create liberty interests independently enforceable in § 1983 actions, or whether they merely provide additional protections of the underlying right to liberty, beyond those constitutionally required, without creating any new liberty interests. The question is undeniably of great importance, given the tens of millions of arrests that occur in America each year. See U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1995, p. 394 (1996) (14,648,700 arrests in 1994). This case therefore presents a split among the circuits on an important question, warranting this Court's review. See Supreme Court Rule 10(a).

II. The evident confusion among the lower courts regarding the mandatory language test calls for clarification and guidance from this Court.

The Ninth Circuit's use of the mandatory language test for pretrial detainees conflicts with *Sandin* v. *Conner*, 515 U. S. 472 (1995). In *Sandin*, the Court explained that it "believe[s] that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." *Id.*, at 483. The Court then called for a "return to the due process principles . . . correctly established and applied in *Wolff* and *Meachum*." *Ibid.* After *Sandin*, it would seem that parsing state statutes and regulations would no longer be the focus of the liberty interest determination. However, as the Ninth Circuit opinion illustrates, the abandonment of the mandatory language test in its entirety has been slow in the federal courts. This continued use of the mandatory language test conflicts with the *Sandin* opinion as well as those circuit and district court opinions that follow *Sandin*'s instruction. This conflict requires clarification from this Court on *Sandin*'s

effect on the continued applicability of the mandatory language test in the procedural due process analysis.

The conflict among the circuit courts as to this important federal question is illustrated by the divergent perspectives of *Sandin*'s abandonment of the *Hewitt* methodology. Within the prisoner context, courts recognize that "*Sandin* expressly overruled the *Hewitt* methodology" and apply the "atypical and significant" hardship test. See, *e.g.*, *Mackey* v. *Dyke*, 111 F. 3d 460, 462 (CA6 1997). However, outside the prisoner context, recognition of *Sandin*'s abandonment of the mandatory language test varies.

In the pretrial detainee context, as Guerra's petition requesting certiorari points out, there are at least three different courts which conclude the mandatory language test is still viable after *Sandin*, and still others have implied its viability in dicta. See Pet. for Cert. 22-23; see also *Mallatte* v. *Arlington County Employees' Supplemental Retirement System II*, 91 F. 3d 630, 636, n. 3 (CA4 1996) (suggesting that *Sandin* is limited to prisoner cases). This conclusion is in conflict with *Watson* v. *City of New York*, 92 F. 3d 31, 37 (CA2 1996).

In *Watson*, the court was asked to determine whether New York Criminal Procedure Law, Section 140.20(1) created a liberty interest in being arraigned or released within 24 hours. *Ibid.* The plaintiff relied on the *Hewitt* methodology to advance this argument. *Ibid.* The Court of Appeals rejected the argument explaining that the "analysis in *Hewitt* . . . was repudiated by the Supreme Court in *Sandin v. Conner* . . . ." *Ibid.* *Watson* thus rejects the notion that *Sandin* is limited to prison discipline cases and rejects the application of the mandatory language test in the pretrial detainee context.

Outside the context of pretrial detainees, courts have also distinguished *Sandin* in order to apply the mandatory language requirements advanced by *Hewitt*. See, *e.g.*, *Moorman* v. *Thalacker*, 83 F. 3d 970 (CA8 1996). In *Moorman*, the court applied the *Sandin* "atypical, significant hardship" test to Moorman's claim involving disciplinary confinement and

concluded that the disciplinary confinement complained of was within the same category as *Sandin*. See *id.*, at 972-973. However, the court's analysis deviated when the court turned to Moorman's second claim involving the loss of good-time credits. *Id.*, at 973.

Instead of looking at the deprivation complained of and determining whether it was "atypical" and "significant," warranting due process protections, the court determined that the state had to have "a mandatory scheme which necessarily affects the duration of a prisoner's sentence" in order for good-time credits to be considered a liberty interest. *Ibid.* Relying on *Wolff* v. *McDonnell*, 418 U. S. 539, 557 (1974) to support this analysis, the court proceeded to search for mandatory language within the Iowa statutes dealing with good-time credits. *Moorman*, 83 F. 3d, at 973. The failure to apply *Sandin* to the liberty interest analysis for good-time credits, while in accord with the decision in the present case, provides further illustration of the Court of Appeals' departure from Supreme Court precedent and the need for further guidance on this point.

III. The anomolous result created by the pre-*Sandin* precedents can only be resolved by this Court.

Between *Sandin* v. *Conner*, 515 U. S. 472 (1995) and unreversed, pre-*Sandin* precedents, there is an anomaly in the law that only this Court can resolve. *Ellis* v. *District of Columbia*, 84 F. 3d 1413, 1418 (CADC 1996) held that "[u]ntil the [Supreme] Court instructs . . . otherwise," courts are forced to follow Supreme Court precedents on point, even if these precedents are based on the *Hewitt* methodology rejected in *Sandin*.

In *Ellis*, prisoners brought a class action suit under 42 U. S. C. § 1983 claiming that they had a due process liberty interest in parole. 84 F. 3d, at 1414-1415. This claim was based on a point system implemented in the District of Columbia for determining parole eligibility. *Id.*, at 1415-1416. The

District Court, basing its decision on the mandatory language in the statutes creating the point system, "held that inmates with low total point scores had an 'expectation of release' and thus a liberty interest in parole." *Id.*, at 1417. The Court of Appeals recognized that at the time of the District Court's ruling, the proper approach to the Due Process Clause relied on the language of the parole regulation. *Ibid.*

The Court of Appeals realized that the *Sandin* opinion may have altered this conclusion and reviewed the precedent in this area of the law. *Id.*, at 1417-1418. The court noted that *Sandin* abandoned the mandatory/discretionary dichotomy. *Id.*, at 1418. But the *Ellis* Court also recognized that *Sandin* did not expressly overrule any Supreme Court precedent using this dichotomy. *Ibid.* This left the court at bay as to what authority controlled. Explaining that the *Sandin* test "seems ill-fitted to parole eligibility determinations," the court turned to *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979) and *Board of Pardons* v. *Allen*, 482 U. S. 369 (1987) for guidance. *Ellis*, 84 F. 3d, at 1418. The court determined that these cases were directly on point. *Ibid.* *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989) instructs lower courts to use the precedent directly on point even when it is based on methodology abandoned in subsequent opinions of the Court. 84 F. 3d, at 1418. Accordingly, the court concluded *Greenholtz* and *Allen* controlled. *Ibid.* The Court of Appeals, realizing that only this Court has the authority to alter this course, returned "to the language of the regulations" to guide its determination. *Ibid.*

Other courts have also recognized the split in authority created by the *Sandin* decision. In *Watson* v. *DiSabato*, 933 F. Supp. 390, 393 (DNJ 1996), the court agreed with the *Ellis* reasoning, conceding "the uncertain status of *Greenholtz* and *Allen*" after the *Sandin* decision. See also *Wilson* v. *Kelkhoff*,

86 F. 3d 1438, 1446, n. 9 (CA7 1996) (suggesting that the Court intended to leave the parole precedent "undisturbed").[4]

Only this Court can resolve the conflict between *Sandin*'s abandonment of the *Hewitt* methodology and the lower courts' obligation to follow unreversed precedents on point. Accordingly, this Court should grant the writ of certiorari to clarify the scope of the *Sandin* decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

November, 1997

Respectfully submitted,

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4. Further, in *Harper* v. *Young*, 64 F. 3d 563, 564-565 (CA10 1995) the court avoided addressing *Sandin*'s effect on pre-*Sandin* authority by analogizing to parole. *Barnett* v. *Moon*, 852 P. 2d 161, 162-163 (Okla. Crim. App. 1993) had implied that prisoners had a liberty interest in participation in Oklahoma's pre-parole supervision program. Instead of determining whether *Barnett* survived *Sandin*'s reforms, the court held that since "program participation is sufficiently similar to parole," participation in the program is protected by the Due Process Clause itself. 64 F. 3d, at 565. Addressing *Sandin*'s effect, the court explained, would be a task of "no small difficulty." *Ibid.* This Court also avoided addressing *Sandin*'s effect by resolving the case on the "narrow question" presented by the petitioner: "whether a program employed by the state of Oklahoma to reduce the overcrowding of its prisons was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972)." *Young* v. *Harper*, 520 U. S. ___, 137 L. Ed. 2d 270, 275, 117 S. Ct. 1148, 1150 (1997).

Supreme Court, U.S.
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No. 97-715

In The

Supreme Court of the United States

October Term, 1997

HECTOR GUERRA,

Petitioner,

vs.

MARY ANN CARLO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In light of *Sandin v. Conner*, ("Sandin") 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) and *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), has a misdemeanor arrestee, who a jury has found to have been intentionally denied a requested telephone call without justification, to contact either an attorney, bail bondsman or family, been deprived of a protectable liberty interest under the Fourteenth Amendment?

2. Does being denied a telephone call, pursuant to a state statute which specifically confers this right on an arrestee for purposes of contacting an attorney, bail bondsman or family, while being held in custody for over 12 hours on a misdemeanor offense, constitute an "atypical and significant hardship" on that arrestee under *Sandin*?

3. Is the Court of Appeals recognition of a clearly-established liberty interest alone, without defining the process that is due to protect the interest, but recognizing that the process in the case was constitutional, merit review by this Court in light of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d. 494 (1985)?

4. Is a governmental official entitled to qualified immunity when that official was found by the jury to have deliberately denied an arrestee a protectable liberty interest which was clearly established at the time of the incident, and no reasonable official would have denied such a right?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding in the courts below. The parties to this proceeding are Respondent, Mary Ann Carlo, and Petitioner, the Watch Commander for the San Bernardino County Jail, Hector Guerra.

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This Petition seeks review of a Ninth Circuit decision which reinstated a jury verdict in favor of the Respondent for violation of her constitutional rights. Specifically, all parties agree that the jury found that the Respondent's civil rights, under 42 U.S.C. § 1983, were violated, when the Petitioner intentionally, and without justification, denied "her access to a telephone while she was jailed after her arrest on charges of driving while under the influence of alcohol." (App. A2 to Petition for Writ of Certiorari, hereinafter "Pet. App."). The Petitioner was the Watch Commander at the jail during the time of her detention. Shortly after the Petitioner went off duty, the Respondent was brought to a hospital for treatment of injuries and returned to the jail at about 2 p.m. the following day, when she was finally granted the use of the telephone. (Pet. App. A3).

The District Court overturned the jury's verdict and granted judgment as a matter of law for the Petitioner, finding no protectable interest in the right to a telephone call, even though the state statute clearly indicated it conferred such a right on an arrestee. The Ninth Circuit reversed the District Court, finding a protectable interest, and reinstated the verdict.

SUMMARY OF ARGUMENT

The Petitioner in this case was found liable for violating the Respondent's civil rights, not when he denied the Respondent an immediate post-booking telephone call, but when he continually refused, without justification, to allow the Respondent access to a phone over a period of five hours. (Petition at 2). Thereafter, the denial of the telephone calls continued well into the afternoon — until 2:00 p.m., when the Respondent was returned from the hospital. (Pet. App. A3).

The denial of access to a telephone call, in this circumstance, constitutes a tangible and substantial threat to a arrestee's access to the Sixth Amendment right to counsel, and the Eighth Amendment guarantee of the right to post reasonable bail. In fact, the jury found that the denial was intentional and without justification. The Ninth Circuit affirmed the jury's finding that such a denial violates an arrestee's protectable liberty interest.

The Petitioner's assertion that the Ninth Circuit has resurrected the "Mandatory Language Test" of pre-*Sandin* cases misrepresents the holding of the Ninth Circuit and of *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). In fact, *Sandin* dealt with the claim of a convicted prisoner, not an arrestee. This Court, in *Sandin*, specifically drew a distinction between arrestees, pretrial detainees, and post-conviction prisoners, leaving open the possibility that the Mandatory Language Test, set out in *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864 (1983), may still apply to cases other than those involving convicted prisoners. The Ninth Circuit was following this court's directive in that regard.

In any event, the Ninth Circuit also applied the "atypical and significant hardship" test of *Sandin*, and found that it was an "atypical hardship" to deny an arrestee the right to access the sole means of contacting an attorney, bail bondsman, or family member while being held in custody — a telephone. Since the jury found that the Respondent was, essentially, held "incommunicado" by the Petitioner, the court found that the denial was a "significant hardship." Moreover, a telephone call would have allowed the Respondent to seek needed medical attention, consult with an attorney or family members, and preserve evidence on her behalf.

The assertion by the Petitioner that the Court of Appeals somehow allowed state law to define the due process in this

case is without support. In fact, the Court of Appeals held only that, under existing Supreme Court case law, a protectable liberty interest was identified. The Court of Appeals balanced the interests at stake, pursuant to controlling Supreme Court precedent, and found that the complete denial of a telephone call violated due process. Clearly, the jury weighed the defenses that the Petitioner had with regard to his reasons for not giving the Respondent access to a telephone call, and found that his reasons were not justified.

The Petitioner's attempt to bias this Court against the Ninth Circuit, by asserting that it is "Constitutionalizing" state law, is pure sophistry, since it is this Court that has repeatedly held that Fourteenth Amendment liberty

> interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from and independent source such as state law. . . ."

Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 538, 105 S. Ct. 1487 (1984) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972)). *See also Vitek v. Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 1261, 63 L. Ed. 2d 552 (1980) and *Sandin*, (recognizing that States may indeed create liberty interests which are protected by the Due Process Clause of the Fourteenth Amendment). *Id.* 115 S. Ct. at 2300. The argument that the Court is constitutionalizing state law is an inflammatory argument without substance in this case. Moreover, by denying an arrestee access to a telephone to post bail, the Petitioner, *de facto*, denies the detainee the Eighth Amendment right to reasonable bail by not allowing her to contact a bail bondsman or family member to post the bail. Additionally, by denying a arrestee access to a telephone to contact an attorney, the Petitioner, *de facto*, denies the detainee the Sixth Amendment

right to have the assistance of counsel for his defense, which would include the potential of preserving evidence.[1]

REASONS FOR DENYING THE WRIT

I.

THE PETITION MISREPRESENTS THE COURT OF APPEALS DECISION REGARDING THE METHODOLOGY FOR IDENTIFYING A PROTECTABLE LIBERTY INTEREST.

Remarkably, the Petition claims that the Court of Appeals has resurrected a "dead" case and applied it to the facts of this case. The Petitioner, apparently believes that *Sandin* overruled *Hewitt*. This notion is easily dispelled by the very language of *Sandin*, which specifically stated that *Hewitt* was not overruled, and the ruling in *Carlo*.

A. Hewitt's Mandatory Language Test Is Still Controlling Law In This Context.

Even a cursory reading of *Sandin* reveals that this Court left intact the *Hewitt* case outside the context of convicted prisoner claims. This Court specifically indicated that its decision in *Sandin*, applied solely to incarcerated prisoners. In fact, this Court's analysis, in leading up to the abandonment of the methodology "made explicit in *Hewitt*," dealt virtually exclusively with challenges asserted by sentenced inmates searching for technical rules violations. The specific departure from *Hewitt* in only those types of cases was clear and unequivocal. Clearly, *Hewitt* is not "dead," especially when addressing claims of prearraignment arrestees. In departing from *Hewitt*, in the context of a convicted prisoner's claim, this Court stated that

1. This is not an exhaustive list of the liberty interests at stake in such a circumstance.

> [t]he punishment of incarcerated prisoners, on the other hand serves different aims than those found invalid in *Bell* [*Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)]. . . . The process does not impose retribution in lieu of a valid conviction. . . .

Sandin, 115 S. Ct. at 2301. More specifically, this Court distinguished *Bell* as "deal[ing] with the interests of arrestees and not convicted prisoners." *Id.* 115 S. Ct. at 2300. *Carlo* acknowledged this explicit language in *Sandin* — language which is completely ignored in the Petition.[2] Hence the Ninth Circuit followed the dictates of *Sandin* in evaluating this case. The Ninth Circuit did not stop there, however. The court also evaluated *Carlo* under the new methodology set forth in *Sandin*. (*See, infra*, Point I, Part C). Consequently, the perceived conflict with Supreme Court precedent, vis a vis *Carlo*, is non-existent and provides no reason for the Court to grant this Petition.

More forcefully, this Court should deny the Petition, since it has already fully and adequately set out the methodology to be used in evaluating claims, by prearraignment arrestees, asserting state law created liberty interests. In *Sandin*, importantly, this Court reiterated its "concern that a State would attempt to punish a detainee for a crime for which he was indicted via preconviction holding conditions." *Sandin*, 115 S. Ct. at 2300. As a result of this concern, this Court has reaffirmed its position that arrestee incarceration is to be more strictly scrutinized. Given the Court's long-standing recognition that a "detainee 'may not be punished prior to an adjudication of guilt in accordance with due process of law,' " such an approach is understandable and appropriate. *Sandin*, 115 at 2300 (citing

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2. The Ninth Circuit recognized that this Court abandoned the reasoning in *Hewitt*, "at least to convicted prisoners" but "explicitly did not over rule it." (Pet. App. A12).

Bell, 441 U.S. 520, 535, 99 S. Ct. 1861, 1871-1872, 60 L. Ed. 2d 447 (1979)). Consequently, the Mandatory Language test is appropriately applied in a case where the danger exists that punishment might be meted out on an unarraigned pretrial arrestee. Such a rule is consistent with Supreme Court precedent, and follows the dictates of *Sandin*.

B. The Reasons For Abandoning The Hewitt Test, As Detailed In *Sandin*, Are Inapplicable To *Carlo*.

The justification for, and bases upon which this Court relied, in abandoning the Mandatory Language Test in the context of a "rule-violation" case filed by a convicted prisoner is totally inapplicable to the circumstance of an unarrraigned arrestee. By way of overview, this Court recognized three problems with the *Hewitt* test in the context of a convicted-prisoner case: (1) the prison regulations were not designed to confer rights upon prisoners, but "to guide correctional officials in the administration of the prison" (*Sandin*, 115 S. Ct. at 2299); (2) prison officials are encouraged to avoid creating "liberty" interests by "having scarcely any regulations or by conferring stewardless discretion" on its personnel. Such a negative incentive jeopardizes the security and safety of the institution (*Id.*); and (3) the federal courts will become intricately involved in the day-to-day operation of the prisons under such a test (*Id.*).

With regard to concern number (1), the State law telephone-call statute *is* specifically designed to confer a right on the arrestee. Specifically, by its language, the statute (California Penal Code § 851.5) states that the "arrestee has the right" to make the telephone calls. More importantly, however, the statute specifically recognizes that the telephone calls are fundamental to the exercise of the arrestee's right to post reasonable bail through family, friends or a bail bondsman, and the right to contact counsel, court-appointed or privately retained, to

preserve evidence, seek advice, or otherwise get assistance. Without the telephone call, the arrestee, by the very fact that he is incarcerated, is denied those Constitutional rights which distinguish this country's fundamental Constitutional guarantees.

With regard to concern number (2), the finding of a Constitutionally protected liberty interest in the statute will not encourage prison officials to seek to avoid regulation, since this statute is not a regulation designed to facilitate the administration of the prison, but is, instead, a "procedural protection . . . of quite a different nature." *Id.*, 115 S. Ct. at 2299. As such, this provision is designed solely to benefit the prisoner and to enable the arrestee to exercise rights that would otherwise have no meaning without the telephone call.[3]

Additionally, arrestees, contrary to the assertions in the Petition, are not going to be "combing" jail regulations to uncover some denial of a "mandatory" right. The "right to a telephone call" necessarily occurs within the initial hours of an arrest, whereafter a pretrial detainee, unable to make bail, will be brought before a magistrate for arraignment and bail review.[4]

With regard to concern number (3), the federal courts will not become intricately involved in the day-to-day operation of the prisons, since this right necessarily, as stated before, deals not with the administration of the prison, but with ensuring

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3. In fact, while it may beg the question, the elimination of this right would in all likelihood (*i.e.*, should) be unconstitutional, since it would effectively (*de facto*) deprive arrestees of their rights under the Sixth and Eighth Amendments.

4. The logical extension of such an argument would be that the prison officials might be encouraged to eliminate attorney conference rooms so that they would not have to worry about conferring on the prisoner the right to meet with counsel at the jail. Of course, the Court, respectfully, would not allow this to happen.

that a arrestee is guaranteed access to his or her Sixth and Eighth Amendment rights. Otherwise, in all likelihood, these rights would have no meaning in the critical hours immediately following an arrest, when they are most needed. There is no legitimate reason to be concerned that this right to a telephone call would more involve the Court's in the administration of the prison than any other guarantee under the Bill of Rights. In other words, the courts will not be more involved in the day-to-day operations of the prisons, because it requires the jail to give a arrestee access to the outside world (necessary to the exercise of a detainee's rights) on a limited basis.[5]

C. The Manner Of Application Of The Sandin Test Is Consistent With The Supreme Court's Ruling.

Even if the *Sandin* test were to be applicable to this case, the Ninth Circuit has adequately addressed the relevant issues. The Petitioner in this case would have this Court hold that the courts can only identify liberty interests on a case by case basis. Such a reading is unwarranted. The Petitioner misreads *Sandin* on this point. This Court did not hold that the liberty interest depends on the particular nature of the deprivation in light of the particular circumstances of a particular inmates confinement. (Petition at 10). Such a rule would require the federal courts to

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5. The Petition seeks to distract the Court from the true issue involving pretrial detainees by focusing on language from cases that indicate a jail (holding arrestees) can be as dangerous as a prison (holding convicted prisoners). The right to provide the telephone call necessarily carries with it the right to a qualified immunity defense if a reasonable officer in such a position could have believed that his denial of the phone call was appropriate. For example, where there exist dangerous conditions in the jail during the time in question, or other circumstances render it impossible in the eyes of a reasonable official. Such can be asserted early on in the litigation in a qualified immunity defense. *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993).

micromanage all institutions to determine whether, under the particular circumstances of an inmate's confinement, a liberty interest exists. The Court has set forth a bright line rule with regard to the existence or non-existence of Constitutionally protected liberty interests. This Court stated

> . . . States may under certain circumstances create liberty interests which are protected by the Due Process Clause. (Citation) But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, (Citation), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin, 115 S. Ct. at 2300. What is crucial is not that the "atypical and significant hardship" is imposed in relation to the particular circumstances of a particular inmates confinement, but "in relation to the ordinary incidents of prison life." *Id.* After an exhaustive review of the circumstances surrounding, not the particular inmate's life necessarily, but of the "ordinary incidents of prison life," this Court determined that the punishment of sentenced prisoners for disciplinary conduct, serves prison management and rehabilitation and is "within the expected parameters of the sentence imposed by a court of law." *Id.*

Moreover, the discipline in *Sandin* "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." *Id.* at 2301. Here, in *Carlo*, however, the right to the telephone calls *are*, as stated before, fundamental to the exercise of the arrestee's right to post reasonable bail through family, friends or a bail bondsman, and

the right to contact counsel, court-appointed or privately retained, to preserve evidence, seek advice or otherwise get assistance. In fact, the statute, by its own language, guarantees legal protection against what *is* an atypical, significant deprivation — the holding of an inmate "incommunicado" — "in which a state might conceivably create a liberty interest." The language of the statute clearly indicates that the State did, indeed, intend to create a liberty interest: the statute clearly bestows the right to a telephone call; the statute envisions that the inmate will telephone a lawyer, bail bondsman or family member for assistance, and, in fact, limits that calls to those people for those purposes; and, finally, the statute makes it a misdemeanor for a government official to violate the telephone call provisions. The statute could not be clearer in its intent to bestow the right upon arrestees to make phone calls to obtain assistance.[6]

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6. The Petitioner's accusation that the Ninth Circuit's analysis of "hardship" was "off-handed" and, so, inadequate, is unnecessarily disparaging and unfounded. The Ninth Circuit examined the right consistent with the directive of this Court in *Sandin*. It is the Petitioner who misreads this *Sandin*. Additionally, the further unnecessarily disparaging accusation that the Respondent was combative is irrelevant given the jury's finding that the Petitioner intentionally violated her rights without justification. The Respondent need not assert every Constitutional violation subsumed within the denial of a telephone-call claim to prevail on this theory. After all, maybe her bail was not excessive, or perhaps she did everything an attorney would have told her to do. The courts cannot decide the *existence* of a Constitutional right based on the particulars of every case — only whether it was violated.

II.

THE PETITION MISREPRESENTS THAT THE COURT OF APPEALS DECISION DETERMINES THAT A STATE STATUTE DEFINES DUE PROCESS.

The Petitioner fails to recognize the qualitative difference between due process cases which require that evidentiary hearings be conducted and cases whereby the Court identifies the particular liberty interest. At issue in *Carlo* was whether California Penal Code § 851.5 created a constitutionally protected liberty interest. As indicated above, the Court of Appeals held that such an interest was created under either the *Hewitt* or *Sandin* tests. (Pet. App. A7). Carlo never argued that the process under the statute was inadequate, only that the violation of the statute was a violation of her constitutional rights. *Id.* Consequently, the Court did not need to "define what process was due under the Constitution." (Petition at 16).

The Petitioner, Respondent asserts, deprived her of a protected liberty interest without any process at all, much less due process; such a deprivation is a Constitutional violation without regard to the definition of what process should be due. That is the holding of the Ninth Circuit. While the courts have, in certain circumstances, defined what procedure need be implicated to protect the right, *Mathews v. Eldridge*, 424 U.S. 319, 334-5, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), this is a case, where the government's interest is clearly outweighed by the interest of the arrestee, such that the liberty interest must be guaranteed within the confines defined by the California statute. In fact, that is what the Ninth Circuit held, that the

> California statute (requiring notice of the right to telephone calls and permitting the denial of a requested immediate phone call only in the case of

> physical impossibility) is sufficient to satisfy constitutional due process.

(Pet. App. A7). The assertion contained in the Petition, that the process should be defined, should be left to another case, where that issue clearly comes before the court.

This perceived failure to identify and define the process due is not grounds for the granting of this Petition. To characterize the Ninth Circuit's desire to refrain from dicta as "a sharp departure from this Court's procedural due process decisions" is hyperbole at best, but more appropriately described as wrong.

III.

THE PETITION MISREPRESENTS THE COURT OF APPEALS DECISION AS CONSTITUTIONALIZING STATE LAW.

Of course, as discussed above, and as the Ninth Circuit correctly pointed out,

> [t]he Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

(Pet. App. A7). The Petitioner's assertion, then, really has no meaning.

It is also clear that California intended to bestow the right upon an arrestee to telephone calls within a certain amount of time, given certain limitations. Respondent submits that such is

a protectable liberty interest under the Fourteenth Amendment. Additionally, Carlo argues that the Petitioner provided inadequate process in violating the terms of the statute. (Pet. App. A7). Such a liberty interest cannot be denied an arrestee without due process of law. *Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

IV.

THE PETITIONER'S CLAIM THAT CONFLICTS EXIST AMONG CIRCUIT COURTS OF APPEAL IS EXAGGERATED AND INSUFFICIENT TO WARRANT THE GRANTING OF THE PETITION.

Since this Court's recent decision in *Sandin*, which abandoned the methodology developed in a fairly long line of cases, only two Supreme Court terms have passed. Invariably, the circuits will wrestle with a new methodology set out by this Court. Not enough time has passed for this Court to determine that a ripe and direct conflict exists in this area sufficient to warrant review.

A majority of the circuits in the Country have not weighed in on this issue. Moreover, those circuits that have issued opinions have held true to the language of *Sandin*. In fact, the cases cited in the Petition reveal that the circuits are following the dictates of *Sandin*. *See Watson v. City of New York*, 92 F.3d 31 (2nd Cir. 1996) (specifically recognizing that *Sandin* abandoned the *Hewitt* methodology in prisoner cases); *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995) (specifically applying the *Sandin* methodology); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995) (again applying the *Sandin* methodology). The Petitioner's assertion that there exists a conflict among the circuits on all of the issues discussed in the Petition and that such is ripe and direct is untenable.

V.

THE PETITION MISREPRESENTS THE COURT OF APPEALS DECISION ON QUALIFIED IMMUNITY.

The Petitioner's assertion that the Ninth Circuit is looking to state law for determining whether a federally protected right is clearly established is a blatant misrepresentation. The Ninth Circuit specifically followed *Davis v. Scherer*, 468 U.S. 183 (1984), when it recognized that "the clearly established right [must] be the federal right on which the claim for relief is based." (Pet. App. A15).

What is omitted from the Petition is any reference to the clear statement in *Davis* that

> neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation — of state of federal law — *unless* that statute or regulation provides a basis for the cause of action sued upon.

Id. 468 U.S. 194, n.12, 104 S. Ct. 3019 (emphasis added).

Given the fact that the California statute was the basis upon which the liberty interest arose, *i.e.*, the State statute created the liberty interest which is entitled to procedural protections of the Due Process Clause of the Fourteenth Amendment (*Vitek v. Jones*, 445 U.S. 480, 488 (1980)), the federal law guaranteeing the right not be deprived without due process was clearly established at the time of the incident.[7]

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7. As in *Anderson v. Romero*, 72 F.3d 518 (7th Cir. 1995), the Petitioner misunderstands the argument herein, thinking that the Respondent is asserting a federal right, per se, to a telephone call.

(Cont'd)

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(Cont'd)

> Not so; the source of the entitlement is a state statute; federal law merely protects [the Respondent] against having his [liberty interest] taken away . . . without due process of law. There is no novelty to this claim. . . . .

Id. at 527.

Additionally, to the extent that the court believes that the right to telephone call rises to a liberty interest per se, "Courts have recognized detainees' and prisoners' first amendment right to telephone access" in the Ninth Circuit, for over ten years. *See Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (citations omitted). The right to a telephone call is so intricately tied to Sixth and Eighth Amendment rights, that it is almost folklore that an arrestee is entitled to a telephone call.